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ABSTRACT

Reviewed are statutory and case laws affecting arrest, prosecution, and treatment of the mentally retarded (MR) offender as part of Project CAMIO, (Correctional Administration and the Mentally Incompetent Offender), a Texas study to determine the incidence of criminal incarceration of the MR and to identify laws, procedures, and practices which adversely affect the prosecution and imprisonment of the MR offender. It is concluded that the proper handling of the MR offender requires the amendment or elimination of laws dealing with the defendant's competency to stand trial and the use of insanity as a defense in a criminal prosecution. Noted is effective commitment without right to bail during the mental examination period, the indeterminate or lifetime commitment without a finding of guilt for MR offenders, and a disparity between commitment and release procedures which serves no legal or therapeutic purposes. Issues are discussed in terms of incompetency laws, treatment of MR persons found incompetent, procedural problems such as the psychiatric examination and the incompetency hearing, and MR and criminal responsibility. Explained are 12 recommendations such as termination of the automatic commitment of defendants who require a competency examination and the prosecution's obligation to prove the MR individual's potential danger to society or himself prior to commitment due to incompetency. (DB)

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# The Mentally Retarded and the Law

PROJECT CAMIO

Volume 3

# PROJECT CAMIO

## CORRECTIONAL ADMINISTRATION AND THE MENTALLY INCOMPETENT OFFENDER

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## 1.0 MENTAL RETARDATION AND COMPETENCY TO STAND TRIAL

It is a rule of long standing in Anglo-American criminal law that an accused may not be tried on a criminal charge if at the time of the proceedings against him his mental condition is such that he cannot appreciate the nature of the proceedings and participate intelligently in his defense. A determination that the accused is mentally incompetent to stand trial does not cancel the trial altogether, but merely postpones it until the accused becomes competent to stand trial. The general practice in such cases is to commit a mentally incompetent defendant to a mental institution until he becomes competent, at which time the trial will resume.

For the mentally retarded individual accused of a crime the laws of incompetency pose special problems, mainly because the laws are designed more for the mentally ill or the insane than for the mentally retarded. First of all, the laws of incompetency do not recognize mental retardation in general, or even specific levels of mental retardation (an IQ of below 60 or even below 50, for example), as the kind of mental condition that renders an accused incompetent to stand trial. Indeed, very little has been said or is even known about the effect of mental retardation on a person's ability to understand the criminal proceedings or to participate effectively in his defense. Second, the idea of postpoining trial until the mentally incompetent defendant regains competency may be appropriate for a psychotic defendant whose chances of improving his understanding of the proceedings and his ability to act rationally in his defense are at best negligible. Third, since there is little hope that a mentally retarded person found mentally incompetent to stand trial will ever become competent regardless of the amount or quality of treatment, committing him indefinitely to a mental institution to await recovery amounts to incarceration in an institution for life -- a life sentence imposed solely on the basis of incompetency to stand trial, without ever having been convicted of a crime, let alone a crime that carries a life sentence without parole.

There is also a constitutional dimension to the problem of the mentally retarded and the laws of competency. Since most agree that due process of law prohibits the trial and conviction of a mentally incompetent defendant, it may be unconstitutional to subject a mentally retarded person to a criminal trial if his disability prevents him from participating effectively in his trial. A recent United States Supreme Court case, however, holds that it is likewise unconstitutional to commit a mentally incompetent defendant to a mental institution for more than a reasonable period of time necessary to determine if there is a substantial probability that he will become competent in the forseeable future. For an accused mentally retarded person who is unable to appreciate the nature of the proceedings against him and participate intelligently in his defense, the criminal law faces an obvious dilemma: it cannot constitutionally try and convict him nor can it tuck him away in a mental institution for a longer period than necessary to determine if he will become competent in the near future -- which for the mentally retarded individual may be a very short period, indeed, in view of the improbability that he will ever become competent.

Besides the problem of under what circumstances a criminal trial should be postponed because the defendant is mentally retarded and the problem of what to do with a mentally retarded defendant found incompetent to stand trial, there are a host of other related problems, both procedural and substantive: the detection of the mentally retarded individuals as they enter the systems of criminal justice; how, when, and by whom the issue of competency is raised; pre-trial mental examinations and the commitment of mentally retarded defendants for these examinations; the methods and procedures for determining the competency of mental retardates to stand trial; and the safeguarding of a mentally retarded person's rights before, during, and after an adjudication of incompetency.

## 2.0 THE LAWS OF INCOMPETENCY

At common law a person could not be criminally tried if unable, because of mental or physical disability, to understand the proceedings against him and to act rationally in his own defense. All states except Washington have enacted statutes dealing with mental incompetency to stand trial on a criminal charge. Most states, however, have merely codified the common law test of incompetency, retaining the common law criteria of ability to comprehend the proceedings and to assist in the defense. The state statutes attempt to specify the exact mental condition required to postpone a criminal proceeding, although the formulations of the test of incompetency vary considerably; many states provide several alternative states of mind justifying a postponement.

Thirty-nine states use the terms "insanity" or "insane" as grounds for finding the accused incompetent to stand trial, 21 of them listing "insanity" or "insane" as the only eligible mental condition, the other 18 giving them as just one of two or more eligible conditions. In 9 states a trial may be postponed if the defendant is mentally defective or mentally deficient, and in 4 states if he is mentally ill. Twelve states apply a test of "incapable of assisting in his defense." Five states use the term "idiot" or "idiocy"; three states use "imbecile"; three, "lunatic"; one, "feeble minded"; and one, "mentally disordered." (c.f. Pate v. Robinson)[1]

In Washington the courts have applied the traditional common law test of incompetency to stand trial. The statute in the District of Columbia uses both "insanity" and "incapable of assisting in his own defense" as grounds for postponing a criminal trial. Pennsylvania, in addition to the typical standards for postponing trial, also applies the test that no person should be tried whose mental illness is severe enough to make it "necessary or advisable for him to be under care." The American Law Institute's Model Penal Code dispenses with labels and defines an incompetent as an accused who because of a mental condition is unable to understand the nature and purpose of the proceedings against him to assist in his defense. The federal statute is to the same effect.

In Texas, Article 46.02 of the Code of Criminal Procedure governs the question of competency to stand trial. It provides:

> Section 2(a). At the trial on the merits, the trial court shall hear evidence on the issue of present insanity....For purposes of present insanity, the defendant shall be considered presently insane if he is presently incompetent to make a rational defense.[2]

Although the statute uses the term "present insanity," it clearly means "incompetency." Present insanity is used to distinguish a mental condition existing at the time of the proceedings that renders a person incompetent to stand trial from a mental condition existing at the time of the alleged offense that relieves a person of criminal responsibility (the "insanity" defense).

In Dusky v. United States, the United States Supreme Court held that the test for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."[3] The Fifth Circuit Court of Appeals has held that this federal standard is binding on the states; therefore, while a state might require a higher degree of mental capacity before it subjects a person to a criminal trial, it would seem unconstitutional to force a defendant who lacks the mental capacity indicated in Dusky to stand trial. Thus, in a statute like Texas' in which competency is defined in terms of making a rational defense, it should be interpreted to include the other ingredient of competency -- a rational and factual understanding of the proceedings.

To be excused from standing trial on a criminal charge as an incompetent, a mentally retarded person must qualify under the applicable competency statute. Regardless of the particular statutory formulation of the test of incompetency, however, the same basic inquiry will be made: whether the mentally retarded individual is capable of understanding the nature and object of the proceedings against him and whether he is capable of assisting in his defense in a rational and reasonable manner. A statutory use of the term "insane," "lunatic," "mentally ill," or the like will not automatically prevent a mentally retarded person from qualifying as an incompetent, nor will a statutory use of the term "idiot," "imbecile," "feeble minded," or "mentally deficient" automatically qualify him. The defendant's "insanity," "lunacy," "mental illness," "idiocy," or "imbecility" -- or lack of any or all of them -- is not conclusive of his competency or incompetency to stand trial; the existence of such a mental disability is relevant only insofar as it affects the defendant's ability to participate effectively in his trial. The same is true for the mentally retarded defendant.

To give some content to the test of incompetency, and to evaluate its suitability for mentally retarded defendants, we should look at the purposes of the incompetency rule. In earlier days, the main reason for the incompetency rule was that a criminal offender who was mentally incompetent to appreciate the nature of the proceedings could not appreciate the significance of conviction and therefore could not repent or be reformed. Today, the primary purpose behind the incompetency rule is to protect the accuracy of the adjudicatory process. Without a competent defendant, we are far less certain about the guilt-determining process. Since a criminal trial is an adversary proceeding, it cannot be assumed that the judge or prosecutor will, on their own initiative, adequately scrutenize the facts and the law needed to constitute the criminal conviction. Such a scrutinization is assured only if the defendant can make arguments and submit evidence to discount or controvert those of the prosecution. An effective defense, then, requires that the defendant be able to grasp and remember the circumstances of the alleged crime, that he be able to appreicate what information is relevant to building a defense, that he will be able to discuss with his counsel before trial the evidence likely to be offered by the prosecutor and to confer with counsel about adverse evidence presented at trial and that he will be able to testify coherently in his own behalf.

The apparent fairness of the criminal process, apart from the accuracy of the adjudication, is another perhaps equally important value the incompetency rule seeks to safeguard. In our adversary system, in which the entire responsibility for defending against the charge rests with the defense, it is difficult to maintain the appearance of fairness if the defendant is incapable of exercising any control over the conduct of his defense. We generally expect the defendant himself to make certain basic decisions, such as whether to plead guilty, not guilty, or not guilty by reason of insanity, and whether to dismiss a counsel with whom he is dissatisfied. To make these decisions the defendant must have some appreciation of the significance of the proceedings, and some ability to understand the charges against him, the defense available to him, and the consequences of his plea.

The incompetency rule may also serve to protect the dignity of the criminal process. On the one hand, since a mentally disabled defendant may conduct his defense in a bizarre manner and disrupt the decorum of the courtroom the incompetency rule may prevent circus-like trials. On the other hand, a passive defendant may tend to destroy the character of the criminal process.

Under our adversary system we expect a defendant to consciously and intelligently participate in his trial; the trial of a defendant who fails to participate seems inappropriate, making the criminal process a one-sided attack against a defenseless object.

Finally, the incompetency rule may still serve some of its older purposes. The philosophy of punishment seems to require that the defendant know why he is being punished. Part of the reason seems to be that society is justified in punishing a person only where there is a possibility that the person convicted will realize the moral reprehensibility of his conduct. Also, if a person convicted and punished cannot comprehend the significance of the punishment, society's interest in reforming him through institutionalized retribution is frustrated.

These are the functions the competency rule is intended to serve. It is obvious that the nature of the particular mental condition of the defendant is not the key to the rule. Rather, it is the ability of the defendant, in light of his mental condition, to comprehend the proceedings and participate in them. Mental retardation in and of itself, then, should not be determinative of a person's competency to stand trial, and the courts have quite rightly refused to use an IQ figure as a hard-fast rule of incompetency. The ability to understand and perform will vary considerably among mentally retarded defendants, depending not only on the individual's intellectual level, but also on many other factors, such as his age, training, personality, communicative skills, and the presence of any mental illnesses. Further, the nature of the alleged crime, the atmosphere of the particular criminal proceeding, the expectations of the court, and even the understanding and abilities of his counsel, may all have some bearing on a mentally retarded persons competency to stand trial. Since the measurement of intelligence is not yet entirely accurate or uniform, and since the results depend to some extent on the skills of the person administering the tests, any rule of incompetency based solely on IQ would seem arbitrary and discriminatory. But most important, neither the legal nor psychiatric professions are prepared to say that a person with a certain level of intellectual deficiency is unable to comprehend criminal proceedings against him and to participate intelligently in his defense.

Thus, until the legal and psychiatric professions, and society at large for that matter, are prepared to say that a certain degree of mental retardation makes a person incompetent to stand trial, the present rules of incompetency are the most appropriate for the mentally retarded.

Exactly how much ability to understand and perform should be required of a mentally retarded person before he is allowed to stand trial is difficult to say. It should be noted that the Supreme Court in Dusky v. United States emphasized the defendant's "rational understanding."[4] Although one might infer that the Court's requirement of rationality indicates it demands a fairly high degree of mental capacity, it seems unlikely that the Court would insist that every defendant have sufficient intelligence and legal sophistication to participate actively in his defense. Such a standard would undoubtedly excuse many more defendants from standing trial than are now excused or than perhaps society is willing to accept. In light of the purposes of the law of incompetency, a mentally retarded individual should be considered competent to stand trial if he is able to recall the factual circumstances surrounding the alleged crime, to relate these facts to his counsel in a coherent manner, to decide with his counsel upon a plea, to approve the legal strategy used at trial, to assist his counsel with the evidence and tactics used in the trial, to testify at trial if necessary, and to appreciate to some degree the significance of the proceedings and his involvement in it. A mentally retarded defendant may function at a level considered below that of an ordinary or average defendant, but nevertheless, at a level sufficient to satisfy the purposes of the incompetency rule. It is only when the defendant's mental retardation so impairs his ability to participate in his trial that we are concerned with the accuracy and integrity of the process that the mentally retarded defendant should not be exposed to a criminal trial.

As we have seen, a rule of incompetency for mentally retarded persons (and for other mentally disabled persons) that stresses capacity to understand and perform is preferable to a rule that looks only to the fact of mental retardation (or to any other mental disability). The vice in many of the existing statutory formulations of the incompetency rule, however, is that they employ such terms as insanity, mental illness, idiocy, and the like. Since all of these disabilities are only tangentially related to the issue of ability to understand and perform, such terms serve no useful purposes. More detrimentally, they can confuse those trying to apply the incompetency rules. Many courts, lawyers, and psychiatrists tend to view the issue of competency to stand trial in terms of a diagnosis of mental illness or mental defect. (If the defendant is found to be psychotic, he is therefore incompetent to stand trial). The use of the term "insanity" presents special dangers to the application of the incompetency rule for it can lead to a confusion of the tests for incompetency and for criminal responsibility. (If the defendant does not know right from wrong he is legally insane and, therefore, incompetent to stand trial). To avoid confusion and insure that courts, lawyers, and psychiatrists apply the correct test for incompetency state legislatures should delete all labels from their competency statutes and rephrase them in terms of a defendant's capacity to understand the proceedings and to act rationally in his defense. It is, therefore, recommended that the Texas Legislature substitute the word "incompetent" for the words "presently insane," and "incompetency" for "present insanity" in Article 46.02 of the Code of Criminal Procedure. It is further recommended that the Legislature define "incompetency" in Article 46.02 as follows:

> An individual will be considered incompetent to stand trial if he does not possess sufficient mental capacity to comprehend the nature and object of the proceedings against him, and to be able to advise and confer with counsel rationally in the preparation and implementation of his own defense.

It is not recommended that the legislature attempt to refer specifically to mental retardation in the incompetency statute, Article 46.02.

## 3.0 TREATMENT OF MENTALLY RETARDED PERSONS FOUND INCOMPETENT TO STAND TRIAL

After a defendant is found incompetent to stand trial, the criminal proceedings are postponed until the defendant becomes competent. The court must order the appropriate disposition of the defendant during this period. At common law, incompetent defendants were automatically sent to jail. Today, most states and the District of Columbia, as well as the federal government, have statutes dealing with the disposition of incompetent defendants. Most of these statutes provide for the confinement of incompetent defendants in a hospital or mental institution. Apparently it is the almost uniform practice to commit incompetent defendants to a hospital or mental institution; usually the maximum-security state mental hospital, to remain there until competency is restored, at which time the criminal proceedings resume.

In thirty-two jurisdictions the commitment of incompetent defendants to a mental institution is mandatory. For example, the Illinois statute provides:

> A person who is found to be incompetent because of a mental condition shall be committed to the Department of Mental Health during the continuance of that condition.

In all of the remaining jurisdictions, hospitalization of incompetent defendants is within the discretion of either the court or the jury. In nine of these states, the court must order commitment if it believes the incompetent defendant is "dangerous" or "a menace." A few other states impose various similar conditions for the commitment of incompetent defendants.

In Texas, the jury that decides if a defendant is "presently insane" (that is, incompetent to stand trial) must also decide if the incompetent defendant should be hospitalized in a mental institution. The standard the jury is to apply in deciding commitment is whether the defendant "requires hospitalization in a mental institution for his own welfare and protection or the protection of others." If the jury finds that the incompetent defendant should be committed, the court must commit the defendant to a state mental hospital, a federal mental hospital, or a Veterans' Administration hospital. If the court orders an incompetent defendant accused of a crime involving physical violence to be committed in a state mental institution, it must send the defendant to the Rusk State Hospital or to another maximum security hospital; if the court orders an incompetent defendant accused of a crime not involving physical violence to a state mental institution, it must send him to the mental institution serving the county in which the committing court is located.

In Texas (as in most jurisdictions) the incompetent defendant is to be confined "until he becomes sane" (or becomes competent).

In all but five states, an incompetent defendant who has been committed to a mental institution must recover competence before he can be released. In four states, an incompetent defendant who has not become competent enough to stand trial may still be paroled, with the authorization of the court having jurisdiction over the criminal charges against him, to a state agency, or, in one state, to a legal guardian or some other person. But except for these paroling states, the prevailing practice is to confine an incompetent defendant in a mental institution until such time as the superintendent of the mental institution certifies that the incompetent is now capable of standing trial. An incompetent defendant may also petition by habeus corpus for his release; several state statutes expressly provide for such habeus corpus proceedings. Whatever method of release, however, the court having jurisdiction over the alleged crime must determine the question of the defendant's competency to stand trial.

Recently, New York has enacted legislation setting an upper limit on the length of time incompetent defendants can be committed. Persons charged with misdemeanors and committed as incompetent must be released after 90 days. For a person charged with a felony and committed as incompetent, the charges must be dismissed and the defendant released after he has been committed for 2/3 of the maximum prison sentence allowable under the offense for which he was charged.

Of course, recovery and release of the accused means that he will be returned to the court's jurisdiction for a resumption of the criminal proceedings. In most states a trial on the criminal charges is mandatory. A few states allow the court to parole the defendant without a trial after he becomes competent;

some states even allow the court to discharge the defendant under certain circumstances. There is some evidence that many prosecutors will drop the charges and not prosecute if the defendant has spent a considerable time in the mental institution before regaining competency.

Although commitment to a mental institution (rather than to jail) is intended to benefit the accused, such commitment in effect deprives the accused of pretrial liberty and may result in his incarceration for a considerable period of time without ever having been convicted of a crime and while in fact still presumed innocent of the alleged crime. On account of this, many critics have condemned the automatic and indefinite commitment of incompetent defendants. For the mentally retarded incompetent defendant, their criticisms are even more forceful.

## 3.1 The Decision to Commit an Incompetent Defendant

The chief objection to the automatic commitment of incompetent defendants is that such commitments fail to recognize that the policies controlling whether a trial should be postponed because of the defendant's incompetence are distinct from the policies controlling whether an incompetent defendant should be committed. As we have seen, the policies behind postponing the trial are concerned with the accuracy and integrity of the criminal process as well as with the fairness to the defendant. But the reasons for committing an incompetent defendant are quite different. The main reason for commitment is to facilitate the recovery of the defendant, so that the trial can be resumed as soon as possible. Another reason for commitment is to protect society and the defendant. Automatic commitment, though, is based solely on a finding of incompetency to stand trial without an inquiry into whether committing the defendant will further the state's interests in effectuating his speedy return to trial or in confining dangerous incompetents. As a result, many incompetent defendants are confined to mental institutions even though the state has no interest in confining them. The automatic commitment of mentally retarded defendants is especially inappropriate. Since it is unlikely that a mentally retarded defendant found incompetent to stand trial will ever become competent, the state's primary purpose in commitment -- treatment to facilitate recovery -- is virtually nonexistent. Thus, unless the mentally retarded person is dangerous, committing him to a mental institution serves no state purpose. Without an inquiry into the dangerousness of mentally retarded incompetent defendants -- something that the practice of automatic commitment bypasses -- there is no guarantee at all that commitment is serving a useful function. Therefore, it is recommended that all statutes and judicial practices that automatically commit incompetent defendants to a mental institution be abolished, in favor of a procedure that inquires into whether the defendant should be committed after he is found incompetent to stand trial.

Abolishing automatic commitments, however, does not solve the dispositional problem; we must set up some guidelines for determining when defendants, especially mentally retarded defendants, should or should not be committed to mental institutions following a finding of incompetency to stand trial. A starting point would be the recognition that a mandatory commitment of an incompetent defendant which serves no legitimate state purpose or where there is an equally effective yet less restrictive means of accomplishing the state's purposes may be an unreasonable abridgment of a defendant's pretrial liberty. Mental incompetency to stand trial does not by itself justify confinement, especially since others charged with similar crimes are released on bail. Commitment should be imposed only where viable state policies are thereby furthered, and where it is the least restrictive method of furthering these policies.

The clearest justification for committing an incompetent defendant and denying him pretrial liberty is to provide the defendant with the treatment necessary to restore him to competency. To justify involuntary commitment on this basis, however, there must be some substantial likelihood that the defendant's disability is curable and that the treatment available at the mental institution will promote recovery. Furthermore, even if it is probable that the defendant can be cured and that hospitalization [illegible] help him, it is also relevant to ask if effective treatment is available without confinement. A principle of constitutional law requires that a state, when infringing on someone's liberty to accomplish a legitimate end, must choose the least onerous means of accomplishing that end. Thus, if outpatient treatment is both available and at least as effective as in-patient treatment, then commitment, a grave infringment of pretrial liberty, cannot be said to be the least restrictive means of assuring that the incompetent defendant will receive the treatment necessary to regain competency. A commitment statute, then, should require a court, before it commits an incompetent defendant to a mental institution, to determine that there is a substantial probability that the defendant's disability is curable, that hospitalization will promote his recovery, and that out-patient treatment is either unavailable or ineffective.

For incompetent mentally retarded persons, such an inquiry is especially important. Since it is unlikely that a mentally retarded defendant found incompetent to stand trial will ever achieve the intellectual ability to stand trial, committing such an individual to a mental institution solely on the justification of providing treatment to restore competency is unwarranted. If there is no evidence that the defendant's inability to stand trial can be overcome, confinement does nothing to further the state's interest. And even if the defendant's disability might be alleviated, committing him to an institution that lacks the facilities or expertise or even personnel to help him become competent likewise does not further the state's interest. And the availability of out-patient services for the mentally retarded may render commitment unreasonably restrictive, since out-patient treatment may be as effective as institutionalized treatment in teaching the mentally retarded the understanding and communicative skills needed to become competent and to stand trial. In the end, though, since the intellectual capacity required to stand trial is quite low, most mentally retarded persons found incompetent to stand trial will have such serious intellectual deficiencies that it would seem highly unlikely that they could ever be taught or trained sufficiently to stand trial. Thus, it is imperative that a court, before committing the mentally retarded, ascertain the probability that they can ever become competent, otherwise, commitment cannot be justified on the state's interest in promoting recovery.

As mentioned before, the federal and nine state statutes prohibit mandatory commitment of incompetent defendants and require that, before committing them, a court or jury must find that the defendants, if released, will pose a danger to society or to himself. The Texas statute, Article 46.02 (2)(b) of the Code of Criminal Procedure, has such a requirement. These statutes reflect the second justification for the commitment of incompetent defendants: the protection of society or the defendant himself. Thus, even if a state cannot justify committing an incompetent mentally retarded defendant on the basis of facilitating his recovery, it may nevertheless confine him if he is dangerous. The difficulty with statutes authorizing commitment only if the defendant is dangerous is that such statutes will be used expediently, without a real inquiry into the dangerousness of the defendant. In the give-and-take of most criminal prosecutions, the court, prosecutor, or jury may be willing to acquiesce in a finding of incompetency, knowing that the defendant will be easily found dangerous and committed. The vagueness of the term "dangerous" facilitates such practices. Further, courts can use such statutes as a means of preventive detention, making sure that an accused is safely locked up pending his trial. Since the recent Federal Preventive Detention Act allows pretrial detention on a finding of dangerousness for only a maximum of 60 days, detaining an incompetent defendant for a much longer, perhaps indefinite period of time as a preventive measure seems legally questionable.

For mentally retarded defendants, as well as for other incompetent defendants, the danger lies in the application of these statutes for the commitment of defendants who are not in fact dangerous to society or themselves. To reduce the risk of committing non-dangerous defendants, (which serves no legitimate state interests) it is necessary to insure that a real inquiry into the defendant's dangerous propensities be made. The Texas statute requires only that the jury be instructed to determine if the incompetent defendant is dangerous and should be hospitalized. The statute should be amended to require the prosecution to introduce evidence sufficient to demonstrate the defendant's potential danger to society or to himself; in other words, the burden of proving dangerousness should be expressly laid on the prosecution's shoulders. Also, it seems appropriate to have the jury decide the question of dangerousness, as Texas does, for the jury seems less likely to be as interested in preventive detention or some other irrelevant objective as perhaps the judge might be; to insure further that the question of dangerousness is decided free from any other considerations, a second jury, different from the one that decides competency to stand trial, might be used to decide the question of dangerousness -- after all, it cannot be stressed enough that the question of commitment is distinct from the issue of competency.

Society's justification for committing dangerous incompetent defendants is essentially the same as the justification for civilly committing mentally ill persons. Both reflect a moral and social judgment about the circumstances in which it is appropriate to confine mentally disabled persons involuntarily. Broadly, the grounds for civil commitment are that the person is dangerous to others or that he is dangerous to himself or in need of care. The same standards used for civil commitments should also be used for the commitment of incompetent defendants. Thus, it is recommended that statutes for committing incompetent defendants as dangerous be adopted or revised so as to parallel civil commitment statutes. In fact, for reasons we shall see in the next section, it may be constitutionally required to use civil commitment standards and procedures for the involuntary commitment of incompetent defendants.

## 3.2 The Duration of the Commitment

To most critics of current incompetency laws and practices, the gravest problems lie in the periods for which incompetent defendants are committed rather than in the actual decisions to commit them. Many are appalled at the injustices that can result from indefinite commitments, or, more precisely, from commitments that last until the defendant becomes competent. Since commitment is mandatory in most states, and apparently the prevailing practice in the others, most incompetent defendants are confined to mental institutions, and, since only four states permit the release of incompetent defendants before they have become competent to stand trial, most incompetent defendants remain confined until they are considered competent. If an incompetent defendant is confined to a mental institution for a period longer than the maximum sentence allowable for the crime for which he was charged, the injustice is obvious. The injustice is equally obvious if he first spends a considerable time in a mental institution, is later found competent to stand trial, is tried, and is then acquitted of the crime, or, perhaps worse, is found guilty and given a full sentence on top of the time already spent in a mental institution as an incompetent defendant. Another problem with lengthy pretrial commitments is that the criminal charge still hangs over the incompetent defendant even though he is incarcerated in a state institution; psychiatrists insist that the pending criminal charge and trial may impede the incompetent defendant's improvement and thereby prolong his confinement. In short, the fundamental criticism of indefinite commitments focuses on the prospect of incompetent defendants languishing in mental institutions for long periods of time, perhaps life, on the sole justification that they were accused but not convicted of a crime, and all done under the name of benign and humane treatment.

Since the chances that a mentally retarded person found incompetent to stand trial will ever become competent are small, committing him until he becomes competent is tantamount to a life sentence. For any mentally retarded person accused of a crime carrying less than a life sentence, such a commitment is grotesquely unfair.

For many years the indefinite commitment of many incompetent defendants has been attacked not only as unfair but as unconstitutional also. A variety of constitutional arguments against such commitments has been advanced. One argument is that it is an unreasonable infringement of personal freedom and, therefore, a violation of due process to confine a person to a mental institution indefinitely solely because he has been accused of a crime and lacks the capacity to stand trial. Another is that the commitment of an incompetent defendant denies him the equal protection of the laws unless the state can show that he is civilly committable, that is, unless he can be committed in the same way and for the same reasons that all other mentally disabled persons are committed. Some have also argued that the indefinite commitment of an accused incompetent and the resulting indefinite postponement of his trial denies him the constitutional right to a speedy trial.

Although these arguments were elaborated and repeated, they met with little success either in the courts (except in a few lower federal courts) or in the legislatures -- until very recently, that is, when the United States Supreme Court tackled some of the constitutional questions. Decided on June 7, 1972, with Justice Blackmum writing the opinion for a unanimous (7-0) court, Jackson v. Indiana appears to demand drastic changes in the statutes and practices concerning the commitment of defendants found incompetent to stand trial.[4] It is of particular significance to this review, for the constitutional questions were answered with respect to an obviously mentally retarded defendant.

The facts and holdings of Jackson v. Indiana are as follows. In 1968, the defendant was arrested and charged with two robberies, involving a total of about $9. The Indiana trial court, apparently on its own initiative, called for an examination of the defendant to determine his competency to stand trial. The court found that the defendant lacked "comprehension sufficient to make his own defense" (that is, competency to stand trial); the court ordered the defendant committed to the Department of Mental Health until it certified that he was "sane" (that is, competent to stand trial).

According to the Supreme Court, the defendant is "...a mentally defective deaf mute with a mental level of a pre-school child," who "...cannot read, write, or otherwise communicate except through limited sign language." The psychiatrists and deaf school interpreter who examined him reported at the competency hearing that his " ...almost non-existent communication skill, together with his lack of hearing and his mental deficiency, left him unable to understand the nature of the charges against him or to participate in his defense." One doctor felt that it was extremely unlikely that the defendant could ever learn to write, read or develop any proficiency in sign language. The other doctor did not think the defendant could ever develop the communication skills necessary to be competent to stand trial. The deaf school interpreter testified that no facilities were available to help someone like the defendant to learn basic communication skills.

After the order committing the defendant for an indefinite period, the defendant's attorney petitioned for a new trial, contending that there was no evidence that the defendant would ever become competent to stand trial and that the commitment therefore amounted to a life sentence. The trial court denied the petition, and on appeal the Indiana Supreme Court affirmed. The United States Supreme Court, however, reversed the commitment order, holding that it was unconstitutional for Indiana to commit the defendant for an indefinite period simply because of his incompetency to stand trial on the charges against him.

To say that all indefinite commitments of incompetent defendants are now unconstitutional would be a bit of an exaggeration. Supreme Court decisions like most of the law itself are not so simple. In Jackson v. Indiana, the Court held that the commitment of this particular defendant was unconstitutional; it did not hold that under no circumstances could a state commit an incompetent defendant; nor did it prohibit even the indefinite commitment of every sort of incompetent defendant. To expose the dimensions of the decision, and hopefully its effects, we need to examine the Court's specific constitutional analysis and holdings.

The Court first held that Indiana's commitment of the defendant denied him the equal protection of the laws guaranteed by the Fourteenth Amendment. Equal protection, in a nutshell, means that a state must treat like persons alike. The vice in the way Indiana committed the defendant was that the standard it used to commit the defendant was more lenient than the standards it uses to commit other mentally disabled persons, those who have not been accused of a crime and lack the capacity to stand trial; and that the standard the defendant must meet to win release was more stringent than the standards other persons committed because of mental disability must meet to win release. In other words, the mere fact that the defendant was accused of a crime and found incompetent to stand trial did not justify the state in applying different standards for commitment and release than it applies for committing and releasing other mentally disabled persons.

Besides the incompetency statute, which authorized the court to commit an accused if the court found he did not have "comprehension sufficient to understand the proceedings and make his defense," Indiana had two other commitment statutes, one for the mentally ill, one for the feeble minded. To commit a person under the statute for the mentally ill, the general civil commitment statute, the state must show that the person is mentally ill and that he is in need of "care, treatment, training, or detention." To commit a person under the statute for the feeble minded, the state must show that the person is feeble minded and unable to care properly for himself. Thus, whereas the state could commit an accused simply by showing that he was incompetent to stand trial, to commit any other mentally disabled person the state would have to show that he was mentally ill and in need of care, treatment, training, or detention, or that he was feeble minded and unable to care properly for himself.

An individual civilly committed as mentally ill would be eligible for release when cured of such illness or when the superintendent discharges him. An individual commited as feeble minded would be eligible for release when his condition "justifies it." So a person committed under either of these can be released whenever the head of the institution thinks it is in the best interests of the person, or whenever he no longer needs the care, treatment, training, or detention that brought about the commitment. On the contrary, an accused person committed under the competency statute is eligible for release only when he becomes "sane", that is, when he can understand the criminal proceedings pending against him and make his defense.

Thus, in both its commitment of the defendant and its requirements for his release, Indiana treated the defendant differently than it treats other mentally disabled persons it wishes to commit. And the mere existence of criminal charges against him did not warrant the dissimilar treatment.

An important point in this part of the decision, however, is that the Court found that the defendant's commitment was not unlike the commitment of a person under either of the other two commitment statutes. Since the medical testimony indicated that it was highly doubtful that the defendant could ever overcome his disabilities enough to be competent to stand trial, no matter how much treatment or training he received or for how long, the Court concluded the defendant's commitment was indeterminate. The Court saw nothing in the evidence that pointed to any possibility that the defendant's condition could be remedied in the future. It found, therefore, that the defendant's commitment was indeed indeterminate.

The significance of this point in the Court's equal protection analysis is that if the defendant's commitment had not appeared indefinite, if there was some possibility that he could have improved under treatment, then his commitment would have been different than the commitment of a person under the other commitment statutes. For if there had been some evidence that commitment and treatment would have helped the defendant become competent to stand trial, the state could have justified its commitment of the defendant on the ground of facilitating his recovery and return to trial, a different ground than is used to justify the commitment of other mentally disabled persons. Since the state would then be justified in using different standards for his commitment and release, there would have been no violation of equal protection. But since his commitment could not be justified on the ground of facilitating his recovery and return to trial, his commitment was in effect the same as the civil commitment of a person under either of the other commitment statutes.

What then, is the impact of the Court's equal protection holding on the statutes and practices concerning the commitment of incompetent defendants in the other states? The upshot, it seems to me, is that a state can no longer commit an incompetent defendant to a mental institution solely on the basis of his incapacity to stand trial, if it appears that the defendant's mental condition is such that he will in all likelihood never become competent to stand trial. To avoid violating the Fourteenth Amendment's Equal Protection Clause, a state must either show that an incompetent defendant it wishes to commit will become competent sometime in the future, or commit him under standards applicable to the civil commitment of mentally disabled persons. If the state cannot show that an incompetent defendant will ever become competent and it cannot commit him civilly, it cannot commit the defendant to a mental institution.

Moreover, it seems that the current confinement of all incompetent defendants who have little chance of becoming competent and who are not civilly committable is unconstitutional. It also seems that all incompetent defendants committed automatically to mental institutions (as is done in most states) or even committed under vague standards of dangerousness (as is done in some 10 states, including Texas) may be able to force the state, through habeus corpus proceedings or otherwise, to show that there is some probability they will become competent, or to commit them under civil commitment standards, or to release them.

The Court's decision may have its greatest impact on the disposition of mentally retarded persons accused of a crime and found incompetent to stand trial. Where mental retardation is the cause of a defendant's incompetency to stand trial, in most cases it is highly unlikely that the effects of mental retardation can be overcome or alleviated so that the defendant can become competent to stand trial. Therefore, most mentally retarded incompetent defendants fall squarely within the Court's holding: if the state cannot show that a mental retardate accused of a crime will become competent (which will usually be impossible), it cannot commit him to an institution solely because he is incompetent to stand trial; if the state wishes to commit him, it must do so under its civil commitment standards; if the mental retardate is neither dangerous nor in need of custodial care (the usual standards for civil commitment), the state must release him.

The point is, a state cannot constitutionally institutionalize a mentally retarded person simply because it has accused him of a crime and found him incapable of standing trial. It is likewise constitutionally impermissible for a state to skirt the problem by simply deciding not to find mentally retarded defendants incompetent to stand trial, for, as we have seen, it is a constitutional requirement that a person not be subjected to a criminal trial if he lacks the capacity to understand the proceedings and participate in his defense. Finally, most mentally retarded persons committed to mental institutions are incompetent defendants are probably confined unconstitutionally, and should either be recommitted under civil commitment standards or be released.

For Texas, the impact of the Court's decisions is more complicated, since instead of committing all defendants found incompetent to stand trial, Texas purports to commit only those defendants a jury considers in need of "hospitalization ... for (their) own welfare and protection or the protection of others." Texas, then, does not rest its commitment of incompetent defendants on their incapacity to stand trial alone, but requires a further determination of dangerousness. This added requirement of dangerousness would seem at first glance, to save the Texas statute from the constitutional defect present in the Indiana statute. The Texas criterion for the non-criminal commitment of a mentally ill person is whether he "requires hospitalization in a mental hospital for his own welfare and protection or the protection of others" -- the exact same criterion used for the commitment of incompetent defendants. So an incompetent defendant is committed under the same standards as any other person, eliminating, it would seem, any equal protection difficulty.

On the other end of the commitment process, however, Texas's statute may not measure up to the constitutional requirement. To be released, an incompetent defendant must become "sane" -- that is, he must be competent to stand trial. For an incompetent defendant whose chances of improving enough to stand trial are slight, such as a mentally retarded incompetent, his commitment under such a standard for release amounts to an indeterminate sentence, very possibly a life sentence. Yet a mentally ill person involuntarily hospitalized under the Texas civil commitment statute is eligible for release whenever he has "recovered", or, in other words, whenever his mental illness no longer requires that he be hospitalized for his own welfare or protection or for the protection of others. Since the release standard for the civilly committed is more lenient than the release standard for incompetent defendants (especially if the committed person suffers from such an irreversible disability as mental retardation), subjecting incompetent defendants to the more stringent standard for release seems to violate the equal protection holding of Jackson v. Indiana.

The reason for the constitutional flaw in Texas's standard for releasing incompetent defendants it has involuntarily committed should be obvious. Texas's decision to commit an incompetent defendant is based on the welfare and protection of the defendant or on the protection of others, not on his lack of capacity to stand trial; but its decision to release an incompetent defendant is based on his capacity to stand trial, not on his welfare or protection or on the protection of others. On the other hand, Texas's decisions to commit a person civilly and to release him from civil commitment are both based on his welfare and protection or the protection of others. It is the different, more stringent standards that incompetent defendants must meet to win release that opens the Texas statute to constitutional attack. Logic, as well as the Fourteenth Amendment, seems to require that Texas, since it commits an incompetent defendant for his own welfare or protection or for the protection of others, release these incompetent defendants whenever their welfare or protection or the protection of others no longer necessitates their confinement.

It is therefore recommended that Article 46.02 of the Texas Code of Criminal Procedure be amended to provide that all incompetent defendants who have been involuntarily committed under Article 46.02 are eligible for release from confinement whenever they do not require hospitalization for their welfare and protection or the protection of others.

In Jackson v. Indiana the Supreme Court also held that Indiana's indefinite commitment of the defendant solely because of his incompetency to stand trial violated due process of law guaranteed by the Fourteenth Amendment. More specifically, the Court held that a state cannot confine a person who has been charged with a crime and committed solely on account of his incapacity to stand trial for any period longer than is reasonably necessary to determine whether there is a substantial probability that he will attain that capacity in the forseeable future; and that, even if the person will probably soon be able to stand trial, there must be progress toward that goal to justify his continued commitment. Although the Court declined to set arbitrary limits on the length of a time a person may be confined, the implication seems clear: an incompetent defendant cannot be confined any longer than it takes to determine if he will become competent in the near future; further more, an incompetent defendant for whom it has been determined that there is a substantial probability he will become competent in the near future cannot still be confined unless he is visibly improving; if it is not shown he will become competent or if he is not progressing toward competency, he must either be civilly committed (if possible) or released.

It should be emphasized that this part of the Court's holding pertains to commitments based on incompetency to stand trial alone; it does not apply to commitments based on dangerousness, or the need for care, treatment, and the like. Thus, in states like Texas that do not base their commitment of incompetent defendants on mere incompetency, this due process holding has little if any effect.

The Court's decision on this point was aimed at the automatic commitment of defendants found incompetent to stand trial. Statutes requiring the automatic or mandatory commitment of an incompetent defendant until he becomes competent tacitly assume that hospitalization will facilitate the defendant's recovery and minimize the time his trial is delayed. Due process requires, according to the Court, that the nature and duration of his commitment bear some reasonable relation to the purpose of his commitment. When the purpose of the commitment is to help the defendant become competent, commitment can have no relationship to this purpose if the defendant can never become competent, regardless of the nature or duration of his commitment. The Court is simply saying, then, that it is unconstitutional to commit a person to a mental institution for a specific purpose when there is no reason to believe it is possible to achieve that purpose.

The impact of this part of the Court's decision is pretty much the same as that of the first part: the automatic, indefinite commitment of incompetent defendants is unconstitutional. What is significant about the second part is that even if a state tries to justify the commitment of an incompetent defendant on the ground of providing treatment to facilitate his recovery of competency (as some 40 states tacitly do now), it cannot confine him indefinitely, but only as long as there is a substantial probability he will become competent in the foreseeable future, and only as long as he is making progress toward competency.

Should a state (like Texas, for example), faced with the prospect of being unable to commit incompetent defendants who are not dangerous to others or in need of protection for themselves, or with the prospect of having to release those incompetent defendants who are no longer dangerous to others or in need of protection themselves, decide to commit incompetent defendants on the basis of facilitating their recovery, this due process holding would come into play and limit severely the time it could constitutionally confine such defendants.

This holding, like the equal protection holding, is especially relevant to mentally retarded persons. In effect it precludes a state from involuntarily committing mentally retarded persons found incompetent to stand trial, unless the individual is civilly committable. Furthermore, it seems to compel a state either to release all mentally retarded defendants who have been committed solely because of their incapacity to stand trial, or to commit them under civil commitment statutes if necessary.

## 4.0 PROCEDURAL PROBLEMS

So far we have looked at the circumstances under which a mentally retarded defendant should be adjudged incompetent to stand trial and at the justifications for and permissible length of the commitment of a mentally retarded defendant who is adjudged incompetent. Now we will briefly look at some of the more important procedural problems involved in the determination of incompetency and in the disposition of incompetent defendants. Suggested reforms in these areas will also be outlined.

### 4.1 Detecting Mentally Retarded Defendants and Raising the Issue of Incompetency

All jurisdictions appear to allow the defendant, the prosecution, or the court, on its own initiative, to raise the issue of the defendant's competency to stand trial. In fact, the Supreme Court in Pate v. Robinson made it clear that all parties have a duty to raise the issue of incompetency whenever there is any evidence of incompetency. Since the trial of an incompetent defendant violates his due process right to a fair trial, and since it is difficult if not impossible to make accurate retrospective determinations of incompetency, the Court held that, whenever there was a "*bona fide* doubt" about the defendant's competence to stand trial, the court must conduct a competency hearing before proceeding to trial. Thus, not only may the defendant, his counsel, the prosecution, or the court raise the issue of incompetency, but a failure to raise the issue and determine the defendant's competency where there is some evidence of his incompetency may very well violate due process and render the trial and conviction of the defendant unconstitutional. Courts and prosecutors, as well as defense counsels, must be on the alert for mentally incompetent defendants; if they are not detected before or during trial, their competency to stand trial cannot be determined, and their trial and conviction may be invalid.

Avoiding unconstitutional trials and convictions of the mentally retarded presents an especially difficult problem to the courts and the prosecutors. At present, it seems that many mentally retarded persons are tried, convicted, and sentenced without ever having their competency to stand trial determined. For example, in their 1966 survey of mentally retarded federal prisoners, Brown and Courtless found that for 92% of the mentally retarded prisoners the issue of their competency to stand trial was not even raised. Several reasons may account for the widespread failure to inquire into the competency of mentally retarded defendants. Most, if not all, jurisdictions have no systematic procedure for testing the intelligence of an accused before or during trial, leaving the detection of a defendant's mental retardation to chance. Unless the defendant behaves in a bizarre manner, or a medical record revealing his retardation is brought to the attention of the court, or an attorney, or unless the judge, the prosecutor, or the defense counsel is insightful enough to suspect mental retardation, it would seem highly unlikely that a mentally retarded defendant who does not point out his own retardation will have his condition recognized and his competency to stand trial determined. The swift, routine manner in which so many accused persons are processed through the courts -- usually a guilty plea taking only a few minutes in court -- reduces even more the probability that a defendant's mental retardation will be noticed and his competency questioned.

What may be the most significant reason for the failure of everyone concerned -- defense counsel, prosecution, and court alike -- to raise the issue of a mentally retarded person's competency to stand trial is the common misunderstanding of what competency to stand trial requires. Many judges and lawyers, it seems, confuse the issue of competency with the issue of criminal responsibility. As a result, if a defendant appears to know right from wrong (the usual test of criminal responsibility), no one will bother to inquire into his capacity to stand trial. As we have seen, however, competency requires the ability to understand the nature of the criminal proceedings and to participate intelligently in the defense. Although a mentally retarded person may have some ability to distinguish right from wrong, such ability is no guarantee that he possesses the mental capacity to stand trial. Through training, conditioning, or the like, a mentally retarded individual may acquire a sense of what kind of conduct is socially unacceptable and, therefore, wrong, yet he may lack the intelligence to participate effectively at his trial. However, as long as the courts, defense lawyers and prosecutors think of competency to stand trial in terms of criminal responsibility, even if they recognize that the defendant is intellectually deficient, there will always be the danger that mentally retarded persons will be tried and convicted without their competency to stand trial even questioned, let along judicially determined.

What then, can be done to insure that the question of a mentally retarded defendant's competency to stand trial will be raised and determined, one way or another, before he is tried and convicted? Obviously, the surest way to detect mentally retarded defendants would be to test the intelligence of all defendants before trial and screen out for a competency determination all those defendants whose IQs fall below some predetermined level. As a practical matter, though, a universal testing program seems prohibitively expensive; in addition, the increase in the number of competency hearings that would inevitably result would burden the courts considerably; lowering the cut-off point would reduce the burden on the courts though some defendants with higher IQs, but nevertheless incompetent to stand trial, might be tried and convicted. Further, if the number of mentally retarded defendants who are detected by this hypothetical program and subsequently found incompetent to stand trial turns out to be small, the program would seem to be a misallocation of the relatively scarce resources for the administration of criminal justice -- a case of too much for too little. Finally, the problem of detecting incompetent defendants is not restricted to mentally retarded persons, but includes all sorts of mentally disabled persons. Thus, universal intelligence testing would detect only one type of potentially incompetent defendants. It would seem more appropriate to set up a program that attempts to identify all mentally incompetent defendants, but since such a program would require psychiatric examination of all defendants before trial, it, even more so, seems prohibitively expensive.

In the end, the responsibility for detecting mentally retarded defendants and for insuring that their capacity to stand trial is determined before they are tried will most likely fall on defense lawyers, prosecutors and the courts. The first step in carrying out this task is for them to recognize that competency to stand trial has its own requirements and that the test for competency is distinct from the tests for criminal responsibility. Once all those involved in a criminal proceeding are aware that a defendant's competency to stand trial depends on his ability to participate effectively at his trial, they should be better able to identify incompetent defendants, especially mentally retarded incompetent defendants. The legal profession must accept the responsibility for educating its members about competency. It is, therefore, recommended that the legal profession -- particularly the criminal bar -- undertake a program of informing defense lawyers, prosecutors, and judges that competency requires that a defendant be able to participate effectively at his trial, not simply that he know right from wrong.

The next step is also educational though perhaps more difficult. Simply knowing the correct requirements for competency will not be enough to insure that all mentally retarded defendants will be identified and found incompetent to stand trial before they are tried. What is needed is a better understanding of both mental retardation and its effect on a person's competency to stand trial. Unfortunately, there seems to be very little information about mental retardation or its relationship to competency available to defense lawyers, prosecutors, or courts. It is, therefore, recommended that those concerned with mentally retarded criminal offenders disseminate to as many criminal lawyers, prosecutors, and judges as possible whatever information is available (or will be) concerning the identification of mental retardates and the impact of mental retardation on a person's ability to function effectively.

The medical and psychiatric professions also have a part to play in the detection of mentally retarded incompetent defendants, for they, too, have been accused of failing to distinguish between the requirements for competency to stand trial and for criminal responsibility. If a doctor or psychiatrist who examines an alleged incompetent defendant inquires into the defendant's ability to distinguish right from wrong, not his ability to understand the criminal proceedings and act in his own defense, then the medical or psychiatric report will not provide the court with a true basis for determining competency. Since it is the unfortunate practice in many courts to accept the medical or psychiatric conclusions without further question, a report finding the defendant "sane" may mean only that he knows right from wrong, yet may nevertheless induce the court to find the defendant competent to stand trial. In this way, it is conceivable that many mental retardates are forced to stand trial even though they may be legally incompetent. To avoid this, the medical and psychiatric professions should attempt to educate their members about the functions and requirements of competency to stand trial. Such an undertaking would have special relevance to mentally retarded defendants, for they may be the very ones who are found competent to stand trial on the basis of medical or psychiatric examinations that looked into only their knowledge of right and wrong, not their ability to understand and perform.

### 4.2 Psychiatric Examination Before Competency Adjudication

Once the issue of the defendant's competency to stand trial is raised, the criminal proceedings are suspended so that the defendant can be examined. Under the prevailing practice, the defendant is committed to a mental health facility for an extensive evaluation. Normally, he is committed for 90 days or less. In Massachusetts, when the issue of a defendant's competency is raised, he is immediately examined in the courthouse by forensic psychiatrists and is not committed to a mental health facility. The District of Columbia has adopted a similar procedure, but in most states the defendant is automatically committed for a pretrial mental examination.

For many defendants the automatic hospitalization for a pretrial evaluation of competency may result in an unconstitutional deprivation of liberty.

In the first place, a defendant who is automatically hospitalized for a competency examination may be deprived of his right to bail. Although there is no federal constitutional right to bail in all cases, there is a federal statutory right to have bail set in all non-capital cases. Further, about 40 states provide, either in their statutes or in their constitutions, an absolute right to pretrial release in non-capital cases. (Article I, section 11 of the Texas Constitution contains such a right.) But once the issue of competency is raised, the setting of bail is deferred, and the defendant is committed to a mental health facility. Generally, the only legitimate reason for denying bail to a defendant is the likelihood that he will fail to appear at trial. The fact that a defendant has been ordered to undergo a mental examination, however, does not necessarily imply that he is unfit for bail. The reasons for ordering an examination are obviously different than the reasons for denying bail. Yet in effect bail is denied automatically whenever a mental examination is ordered. Since the denial of bail is a denial of liberty, due process would seem to require that, at the very least, the court hold a hearing to determine the defendant's fitness for release on bail before it commits him to a mental health facility for a psychiatric evaluation of his competency to stand trial. At this hearing, the court should determine on an individual basis if the defendant qualifies for bail; if he does, then he should be released on bail and ordered to report for psychiatric examination as an out-patient. If in-patient examination of the defendant is necessary, or if out-patient facilities are unavailable, then the court would be justified in ordering commitment. But the automatic, general commitment of all defendants for pretrial competency examinations seems arbitrary and unnecessarily restrictive.

The second objection to the automatic commitment for pretrial competency examinations is that the period of confinement for the examination may be unreasonably long. The test for determining the competency of a defendant to stand trial is rather narrow: whether he understands the proceedings against him and is able to participate rationally in his defense. In most cases, it is difficult to see why such an evaluation will take up to 90 days. In Massachusetts, the quick examinations provided in the courthouse have proven to be sufficient in all but a few unusual cases. A lengthy commitment may, therefore, unreasonably deprive a defendant of his liberty.

It is recommended that the states, including Texas, discontinue the practice of automatically committing a defendant for a competency examination and, instead, only commit those defendants who have been determined ineligible for bail, or who for some medical or other legitimate reason cannot be examined on an out-patient basis; and that these states, when they do commit a defendant for a pretrial competency evaluation, confine him for as short a period as is reasonably necessary to evaluate his competency.

These reforms should serve to safeguard the rights of many mentally retarded defendants. In general, the probability that mentally retarded defendants would fail to appear at trial if released for out-patient examinations seems small; therefore, most of these mental retardates would be eligible for release on bail, rather than automatically committed. Also, since the psychiatric evaluation of a mental retardate's competency to stand trial should not require an extensive period, certainly not 90 days in most cases, mental retardates who are committed for competency evaluations would be confined for a much shorter period of time than they are under present laws and practices.

### 4.3 Hearing on the Issue of Incompetency

After an allegedly incompetent defendant has undergone a pretrial psychiatric examination, the court then holds a competency hearing. at which the competency of the defendant is determined. If there is any evidence pointing to a defendant's incompetency, the Supreme Court has held that a competency hearing is constitutionally required. However, since all jurisdictions do provide for a competency hearing, all states would appear to comply with this constitutional requirement.

It is in the quality of the competency hearings that problems arise. Due process requires that any person facing a loss of liberty be accorded a full and fair hearing. Since a finding of incompetency may result in commitment to a mental institution -- surely, a loss of liberty -- due process requires a full and fair hearing on the issue of incompetency. The chief difficulty with many competency hearings is that the court simply accepts the conclusions of the doctors or psychiatrists who examined the defendant. Yet the determination of incompetency is ultimately a judicial rather than a medical finding. The tests for competency to stand trial are essentially legal; indeed some have argued that the tests for competency are so legal in nature that psychiatrists or doctors should not even participate in the determination of competency. In any event, it is essential that the court not just acquiesce in a medical or psychiatric report, but make an independent, informed decision about the defendant's competency.

Thus, to guarantee that a defendant is accorded his due process right to a full and fair competency hearing, the court must possess adequate information upon which to base its decision; it must hold a full evidentiary hearing; the defendant must be represented by counsel and have an opportunity to examine all witnesses testifying about his competency and to present evidence; and the prosecutor must also have an opportunity to examine all witnesses and present evidence.

The most important requirement, though, is for the court to reject the conclusionary findings of the experts and examine carefully the medical and factual bases underlying those findings. For mentally retarded defendants, this is especially important, since lawyers, judges, or even jurors should be able to determine the ability of a mental retardate to participate effectively at his trial equally as well, if not better than, psychiatrists. Observing the individual function at the competency hearing should provide a more accurate basis for judging his competency to stand trial than a psychiatric examination in a mental hospital.

It is, therefore, recommended that courts discontinue the practice of perfunctorily accepting the conclusions of the doctors or psychiatrists who examine the defendant, and conduct a full and fair evidentiary hearing to reach an independent, informed decision on the question of the defendant's competency.

### 4.4 Periodic Examination of Committed Incompetent Defendants

Under the Supreme Court's recent holdings in Jackson v. Indiana, it is no longer constitutionally permissible to commit a defendant found incompetent to stand trial for an indefinite period. However, present law inadequately insures that defendants will be tried when they in fact become competent, or will be released when a reasonable period necessary to determine if they will become competent in the forseeable future expires or when they are not making progress toward competency. Most statutes place the responsibility for determining if the defendant has recovered competency on the superintendent of the mental institution to which he is committed. Placing this discretion in the hands of the superintendent seems inappropriate. Not only may the superintendent, typically an already overburdened administrator, be too busy or too understaffed to make sufficiently thorough examinations to determine whether a defendant has recovered competency; but also the superintendent and his staff of physicians are medical experts, yet the question of whether a defendant has become competent to stand trial is essentially a legal question, more appropriately placed in the hands of the court. Even if the standards for releasing an incompetent defendant are changed to reflect the defendant's dangerousness or need for care and protection (as they should be to comply with Jackson v. Indiana), the superintendent is still an inappropriate person to make the decision, for it, too, is essentially legal and not medical.

Although incompetent defendants committed to a mental institution can seek their release through a habeus corpus petition, the mere right to bring a habeus corpus petition seems inadequate to insure that incompetent defendants will not be confined unnecessarily. Many defendants will lack the legal sophistication to initiate habeus corpus proceedings; they will also have difficulty in obtaining the assistance of counsel, especially while they are confined in an institution.

Finally, under the requirements of Jackson v. Indiana, a defendant can only be committed long enough to determine if he will become competent in the forseeable future and then only as long as he continues to progress toward competency. Since these requirements do not exist yet in most states, there are no established procedures for complying with them. The superintendent of the mental institution is equally ill-suited to insure compliance with these new, more time-consuming, legalistic requirements. Habeus corpus would also be inadequate.

What is needed, then, is a periodic judicial inquiry and determination of a defendant's likelihood of becoming competent, of his progress toward competency, and, ultimately, of his recovery of competency. Several lower federal courts have already suggested that the court committing an incompetent defendant has a duty to inquire "from time to time" into a defendant's condition and determine if he has become competent to stand trial. But in light of Jackson v. Indiana a more formal, routine system of judicial inquiry seems obligatory. Therefore, it is recommended that statutes be enacted requiring the court to inquire into the defendant's condition at stated intervals; for example, a court could be required to hold a hearing three months after the defendant has been committed to determine if there is a substantial probability that he will become competent in the forseeable future; and to hold hearings every six months thereafter to determine if the defendant has recovered competency or is at least progressing toward competency.

Such mandatory inquiries into the status of committed incompetent defendants should serve to guarantee that mentally retarded defendants are not confined when there is very little possibility that they will become competent to stand trial and when they are not in fact improving in the direction of competency. For most mental retardates, a commitment until they become competent amounts to a life sentence. Jackson v. Indiana prohibits such commitments. Periodic judicial inquiry would insure that such commitments do not happen.

## 5.0 MENTAL RETARDATION AND CRIMINAL IRRESPONSIBILITY

In this section we are concerned with the concept of criminal irresponsibility and its consequences for the mentally retarded. Since medieval times the Anglo-American criminal law has exempted an indefinite group of mentally disabled persons from criminal responsibility on the ground of "insanity." Commonly known as the defense of insanity, this exemption is perhaps one of the most widely discussed yet least agreed upon topics in the whole of criminal law. Most of the arguments have centered around who should be included in the class of mentally disabled persons eligible for the defense of insanity and how the legal rules should be framed to define this class. Scant attention, however, has been paid to the mentally retarded. Very few have tried to say whether mental retardation, by itself, should or should not relieve a defendant of liability for his otherwise criminal conduct. In fact, it is not certain if the existing legal rules for the insanity defense recognize mental retardation as a basis for excusing a defendant from criminal liability. Our problem, then, is to determine how this insanity defense affects the mentally retarded, and how, if advisable, it should be modified to take into account the special problem of mental retardation.

At the outset, it should be pointed out that "insanity" as used in reference to the defense of insanity is strictly a legal term, with no corresponding medical or psychiatric meaning. ("Insanity" is also used, again as a legal term, to refer to other types of mental incompetence, such as to stand trial or to justify civil commitment.) Here, however, we are concerned with insanity as a defense to a criminal prosecution. In this context, "insanity" means something like "...that degree or quality of mental disorder which relieves one of the criminal responsibility for his actions."

It should also be pointed out that the insanity defense is not exactly a defense to a criminal prosecution. This is true at least in the sense that other defenses to a criminal prosecution, such as the defense is interposed, the defendant is released outright. A successful insanity defense, however, usually results in the commitment of the defendant to a mental institution until he recovers his sanity. The defense of insanity is unique, then. A jury verdict or judicial finding of "not guilty by reason of insanity" brings an end to the criminal prosecution, but does not usually bring about the release of the defendant.

The concept of criminal responsibility, or, as we have been calling it, the defense of insanity, is also unlike the concept of mental incompetency to stand trial. Though both halt the criminal proceedings against the defendant, a finding of incompetency to stand trial merely suspends the proceedings until the defendant becomes competent, while a finding of "not guilty by reason of insanity" ends the proceedings forever. Though both usually result in the commitment of the defendant, an incompetent defendant must still stand trial after he is released from commitment, while a defendant acquitted on the basis of the insanity defense will usually go free (unless civilly committed) after he is released. Finally, though both are concerned with the mental disability of a defendant, the function of incompetency laws is to prevent, for reasons of fairness and humanity, the trial of a person who is mentally incapable of understanding the criminal proceedings and of participating in his trial. The function of the insanity defense is essentially to relieve from criminal responsibility and the penal sanctions that may follow a conviction, a person who was mentally disabled at the time he allegedly committed the criminal offense.

Yet, for the mentally retarded the insanity defense, despite its different operation and function, presents many of the same basic problems as the laws of incompetency. First, there is the question of whether mental retardation is or should be the kind of mental condition that excuses a person from criminal responsibility for his acts. If so, then what degree of mental retardation is, or should be necessary to excuse the defendant. Also, how can the legal rules for the defense of insanity be formulated to accomodate mental retardation. Second, if a mentally retarded person is excused from criminal responsibility, under what circumstances is it permissible for the state to commit him to a mental institution, and under what circumstances should the state commit him. Must the mentally retarded person be dangerous to himself or to society. Can rehabilitation justify committing him. Does the mere fact that he successfully pleaded the defense of insanity authorize the state to commit him to a mental institution. Third, for how long can the state confine a mentally retarded defendant acquitted through the defense of insanity? The commitment of an "insane" mentally retarded defendant until he becomes "sane," like the commitment of an incompetent mentally retarded defendant until he becomes competent, amounts to a life sentence. Does Jackson v. Indiana have any potential impact on the commitment and confinement of mental retardates who successfully pleaded the defense of insanity? Finally, some procedural aspects of the insanity defense are of special concern to the mentally retarded.

## 5.1 Legal Standards for Criminal Responsibility

Today there are a variety of legal standards or tests that are applied for the defense of insanity. Several jurisdictions use more than one of the tests; some have developed their own variations of the tests. Although the debate over which test is best has been going on for a century or so and has engaged all kinds of judges, lawyers, legal scholars, commissions, psychiatrists, philosophers, and sociologists, there is perhaps less agreement today about the correct test than there ever has been. While some call for the enlargement of the class of persons eligible for the defense of insanity, others argue that the defense should be abolished altogether. One problem is that many disagree even about the purposes of the insanity defense. This disconsensus over the purposes of and tests for criminal irresponsibility makes it difficult, if not impossible, to decide the critical questions concerning the mentally retarded and criminal irresponsibility. Should mental retardation qualify for the defense of insanity and, if so, which legal standard is most suitable for mentally retarded defendants? Some insight can be gained from a look at the various tests for the insanity defense and at their application to mental retardation.

In the overwhelming majority of jurisdictions in this country, what is known as the M'Naghten rule has long been used as the test for the defense of insanity. Almost two-thirds of the states, the federal jurisdiction, and the military apply the M'Naghten rule, which says that a defendant is not criminally responsible if, at the time of committing the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, he did not know what he was doing was wrong -- in common parlance, the "right from wrong" test. There are two alternative tests to the M'Naghten rule: did the defendant know the nature and quality of the act; or did he know that the act was wrong. However, the most common form of the test is "...whether the defendant had the capacity to know right from wrong in respect to the particular act charged." In any event, the emphasis is on knowing, on the cognitive function. More important, however, is that the test also requires that the defendant have a mental disease that so impaired his reason that he lacked the capacity to know right from wrong.

Theoretically, then, the requirement of a mental disease as the cause of the defenctive reasoning would seem to foreclose in M'Naghten jurisdictions the availability of the insanity defense for the mentally retarded. There has never been a clear and comprehensive determination of what type of mental disease is required to satisfy the M'Naghten rule, however. Some have asserted that only certain psychoses will suffice. However, the general rule seems to be that mental defects can qualify as mental diseases under the M'Naghten test. To qualify, though, a mental defect must have caused the defendant's lack of capacity to know the nature and quality of the act, or that the act was wrong. Some courts have not allowed intellectual deficiency to satisfy the M'Naghten rule. However, more courts seem to have allowed it, and those that have, have indicated that the defendant's mental deficiency must be so severe as to deprive him of the knowledge required by the M'Naghten rule. The Georgia Supreme Court has said that, to qualify it is not enough that the defendant "...had a mentality of a child nine or ten years old; he must be an idiot." The Wisconsin Supreme Court has accepted "feeblemindedness" as a basis for exculpating the defendant under the M'Naghten rule.

Under the M'Naghten rule, at best, mental retardation may qualify in some jurisdictions; at worst, the emphasis on knowing and the requirement of a mental disease operates to exclude mental retardates automatically. Of all the various tests for the insanity defense, the M'Naghten rule seems to ignore the special condition of mental retardation the most.

In somewhat less than half of the jurisdictions that follow the M'Naghten rule, a second test -- commonly called the "irresistible impulse" test -- is also applied to the defense of insanity. Broadly, under the "irresistible impulse" test, a defendant will be found "not guilty by reason of insanity" if he had a mental disease that prevented him from controlling his conduct. Under this test, the insanity defense is still available, even if the defendant knew what he was doing and that it was wrong. The "irresistible impulse" test is a lack-of-control test, requiring the defendant to be unable, because of mental disease, to choose between right and wrong. It is a test of the defendant's capacity for self-control or free choice and the label "irresistible impulse" is a bit inaccurate.

Here, too, the requirement of a mental disease may disqualify mental retardation as a basis for fulfilling the "irresistible impulse" test. Again, however, there is no definitive statement about what kinds of mental disabilities will qualify. Since the test is used in conjunction with the M'Naghten test, it is likely that the same mental conditions that will satisfy M'Naghten will also satisfy the "irresistible impulse" test. Therefore, in some jurisdictions at least, mental retardation may serve to relieve a defendant from criminal liability under the so-called "irresistible impulse" test. The troublesome question, however, is whether mental retardation as such can be shown to reduce a person's capacity for self-control enough to satisfy the test, which as a general rule does not seem to require an absolute loss of self-control. For a successful insanity defense, a mentally retarded person must at least persuade a jury that his disability so impaired his self-control that under the circumstances he was unable to resist committing the criminal act. Exactly how much of an opportunity the mentally retarded has to succeed under this test depends, of course, on the severity of his retardation. In most cases it will also depend on the availability and willingness of psychiatrists to testify about the effect of mental retardation on his capacity for self-control. Since most psychiatrists may not be ready to say that mental retardation can reduce a person's self-control to the point where he cannot resist the urge to commit a crime, a mentally retarded person may find it difficult to assert successfully the insanity defense under the "irresistible impulse" test.

The third test for the insanity defense was adopted by New Hampshire in 1871. According to the New Hampshire Supreme Court, a defendant was to be found not guilty by reason of insanity if his crime "...was the offspring or product of mental disease." However, for over 80 years no other jurisdiction adopted the New Hampshire rule. In 1954, the United States Court of Appeals for the District of Columbia, in the now-famous case of Durham v. United States, held "...that an accused is not criminally responsible if his unlawful conduct was the product of mental disease or defect."[5] The "product" rule, or Durham rule, was heralded by many as a salutary departure from the restrictiveness of the M'Naghten and "irresistible impulse" tests. Since then, however, only Maine and the Virgin Islands have adopted the Durham test, and several appellate courts have expressly rejected it.

By using the term "mental defect," the Durham rule seems to recognize mental retardation as a basis for establishing the insanity defense. The Durham opinion even explained that a mental defect, as opposed to a mental disease, was a condition that is incapable of improving or deteriorating -- which surely includes mental retardation. After Durham, everyone thought that non-psychotics, including the mentally retarded, would now be eligible for the insanity defense in the District of Columbia. It would seem obvious that a mentally retarded person's criminal act could be the "product" of his mental retardation, thus qualifying him for a finding of not guilty by reason of insanity.

Apparently, however, it has not quite worked out this way. For example, a study of instructions given to District of Columbia juries hearing insanity defenses found that the jurors were not even told that non-psychotic mental conditions could satisfy the test for the defense of insanity. More importantly, however, the District of Columbia Court of Appeals in subsequent attempts to clarify and explain the Durham test has restricted the scope of the test, perhaps enough to exclude the mentally retarded from its coverage. In response to criticism that the term "product" was too vague and unmanageable, the court said that "product" means "...but for this disease the act would not have been committed." Thus, the definition of product became a but-for test of causation. For a mentally retarded defendant, it would seem more difficult to persuade a jury that except for his retardation he would not have committed the crime than to persuade them that the crime was a product of his retardation. Though it is perhaps a matter of semantics, the but-for phrasing does require a close relationship between the act and the mental condition, whereas the use of "product" indicates that perhaps the act and the condition need not be so closely related. This critical limitation on the scope of the Durham test, at least for the mentally retarded, came in 1962 when the court tried to explain the term "mental disease or defect." It said that "...mental disease or defect includes any abnormal condition of the mind which substantially impairs behavior controls." Thus, the Durham rule now requires that the defendant's "mental defect" substantially affect his "behavior controls." It is this requirement of behavioral consequences that might make it hard for many mentally retarded defendants to assert successfully the insanity defense under the Durham rule. For the extent to which mental retardation impairs volition is largely uncertain, and psychiatrists may be unwilling to testify that the defendant's retardation had in fact substantially impaired his behavioral controls.

Perhaps it is in psychiatry that the real difficulty in the application of the Durham rule to the mentally retarded lies. Behind the Durham rule was the idea that the M'Naghten and "irresistible impulse" test were too restrictive, that their entire focus on the cognitive and volitional elements failed to take into account modern developments in psychiatry telling us the mind was not so simple, but a functional unit, and that it was time to open up the insanity defense and let psychiatrists testify about the nature of mental diseases and defects and their relationship to criminal behavior. Until psychiatry is ready to say what the relationship between mental retardation and deviant behavior is, however, the Durham rule will probably not be of much use to the mentally retarded defendant.

In 1955, the American Law Institute in its Model Penal Code proposed a fourth test for the defense of insanity. A modernized blend of the M'Naghten and "irresistible impulse" tests, the A.L.I.'s "substantial capacity" test reads as follows:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The A.L.I. test focuses on impairment of cognition and impairment of volition. Unlike M'Naghten and "irresistible impulse" however, the A.L.I. test requires only a lack of substantial capacity, not a complete impairment of cognitive or volitional capacities. The A.L.I. test also uses the term "appreciate" instead of "know", thereby indicating that the emotional or affective aspects of a defendant's personality are relevant. In the "conform" part of the test, it is clear that the loss of volitional capacity does not need to be sudden or spontaneous, as was often thought to be required under the "irresistible impulse" test, but may be the result of brooding or reflection. On the whole, the A.L.I. test is not very different than the *Durham* test as modified to require behavioral consequences.

So far, eight out of ten United States Courts of Appeal have approved of the A.L.I. test; five state legislatures have enacted versions of the A.L.I. test; and at least three state courts have adopted the test (though at least three other state courts have rejected it.) In general most commentators seem to approve of the test, although it has its critics. It seems likely that more legislatures and courts will adopt the A.L.I. test in the future, probably because it does not radically depart from M'Naghten and "irresistible impulse" while allowing for more modern psychiatric evidence.

It is still uncertain how mentally retarded defendants will be treated under the A.L.I. test. Explicit use of the term "mental defect" does of course, imply that mental retardation is a qualifying mental disability. (The Illinois statute adopting the A.L.I. test replaces "mental disease or defect" with "mentally ill," thus perhaps excluding mental retardation altogether.) Also, since the A.L.I. test requires less impairment of the cognitive or volitional functions than is required by the M'Naghten or "irresistible impulse" tests, the mentally retarded should have a better chance of showing that their retardation qualifies them for the defense of insanity. For mental retardates, then, the A.L.I. test seems a clear improvement over the M'Naghten and "irresistible impulse" tests, though it may not be more advantageous than the Durham rule, at least in its unmodified form.

## 5.2 Should the Mentally Retarded Not Be Criminally Responsible

Any decision to enlarge the application of the insanity defense to include the mentally retarded should be made in light of the purposes of the insanity defense. If the purposes of the insanity defense would be served by excusing some or all mentally retarded defendants from criminal responsibility, then we should consider reformulating the legal tests for the insanity defense to recognize explicitly that mental retardation may be a basis for establishing the defense. If exampting the mentally retarded from criminal responsibility does not further the aims of the insanity defense, however, there is no justification for changing the legal rules on behalf of these defendants. As it stands now, however, the legal rules are ambiguous, neither including nor excluding the mentally retarded from the class of mentally disabled persons the criminal law will not hold responsible for criminal acts.

One view of the purpose of the insanity defense is that it "...authorizes the state to hold those 'who must be found not to possess the guilty mind (mens rea)', even though the criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offense charged." Since the state must prove that an accused had the requisite mental state at the time the offense was committed before it can convict and punish him, an accused whose mental condition prevented him from forming the requisite state of mind (the "guilty mind") could not be convicted and punished, even though he did in fact commit the crime. The insanity defense, under this view, serves to justify the commitment of persons who could not otherwise be committed because they could not be criminally convicted; it is a device whereby certain persons are singled out for commitment as an alternative to outright release.

In theory, at least, this view of the function of the insanity defense has some merit. Undoubtedly, there are many cases in which the circumstances giving use to the insanity defense would also warrant a finding that the defendant did not commit the criminal acts with the state of mind required to convict him of the crime charged. But there are also cases -- for example, a prosecution for a strict-liability crime -- where the insanity defense is available, although no particular mental state is required for conviction. Further, this function of the insanity defense seems inappropriate where the test for the defense depends on behavioral control. A defendant may have ample understanding of the nature and quality of his criminal acts and therefore in all likelihood the requisite mens rea also, but he may nevertheless be found not guilty by reason of insanity if he was unable to resist the urge to commit the acts or to conform his conduct to the requirements of law. As a practical matter, however, this view of the purpose of the insanity defense seems contrary to the operation of the insanity defense. In most cases, it is the defendant, not the state, asserting the insanity defense; if the alternative to the insanity defense was outright acquittal, the state, not the defendant, would seem to be the one asserting it. Under this view, if the defendant can prove insanity, he can also prove lack of mens rea, and thereby defeat the criminal charge. But since most courts do not allow a defendant to introduce evidence regarding his mental disease or defect to show lack of mens rea, perhaps the courts are, by allowing such evidence in to establish the insanity defense, tacitly using the insanity defense as an alternative to the outright acquittal of the defendant due to his lack of mens rea.

If this is the purpose behind the insanity defense, allowing the mentally retarded to qualify for the defense would seem to further this purpose as well as allowing any other mental disability.

Since mental retardation may prevent the requisite criminal state of mind from forming, there is no apparent reason not to single out mentally retarded persons for commitment via the insanity defense as an alternative to acquittal. It should be mentioned, though, that this view of the function of the defense is essentially cynical. The insanity defense serves no purpose except to authorize the state to commit individuals it could not otherwise commit. Thus, it hardly seems appropriate to expand the coverage of the insanity defense if it will only serve to increase the number of persons the state can commit to institutions. What this view of the purpose behind the insanity defense calls for is an expansion that allows mental disease or defect, including mental retardation, to negate the requisite mental state and thereby prevent the conviction and punishment of individuals lacking the mental capacity for criminal intent. At least it calls for the elimination of the insanity defense as a mechanism to separate out certain mentally disabled persons for commitment as an alternative to acquittal; it argues for treating all mentally disabled defendants alike, acquitting those lacking _mens rea_ and convicting those having _mens rea_.

Perhaps the better or more common view of the purpose of the insanity defense is that the defense enables the systems of criminal justice to separate out for special treatment certain persons who would otherwise be subjected to the penal sanctions that usually follow convictions. In the comments to the Model Penal Code, the

American Law Institute expressed it this way:

> What is involved specifically is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction, with resultant sanctions in which there is inescapably a punative ingredient (however constructive we may attempt to make the process of correction) and modes of disposition in which that ingredient is absent, even though restraint may be involved. To put the matter differently, the problem is to discriminate between the cases where a punitive - correctional disposition is appropriate and those in which a medical - custodial disposition is the only kind the law should allow.

In short, this view says that the insanity defense serves to bring about commitment of the defendant in lieu of conviction and imprisonment.

In light of this purpose, the question for the mentally retarded is whether the criminal law should separate them out for the special medical - custodial treatment, or whether they should be subjected to the usual punitive - dispositional treatment. If a medical - custodial disposition is more appropriate for the mentally retarded, then the insanity defense, the mechanism used to single out those for special treatment, should be enlarged to include mental retardation as such. However, the analysis of what kinds of mentally disabled persons should be singled out for special treatment usually proceeds backwards. The inquiry is into what kinds of mentally disabled persons should not be subjected to the punitive - correctional treatment. In other words, the focus is on punishment; specifically, on the kinds of persons for whom punishment will not serve the ends of the criminal law. The idea is that if punishing a certain person does not further the aims of criminal justice, then he should not be punished, but given special treatment instead.

One purpose of punishment, called special deterrence, is that punishment serves to deter the person punished from future criminal conduct. Since it is unlikely that an "insane" person will understand the significance of punishment and respond to it accordingly, punishment will not deter him from future criminal conduct. The insanity defense, then, operates to divert these non-deterrables away from a punitive - correctional disposition and into a medical - custodial one. Certainly, non-deterrable mentally retarded persons should not be punished, at least not for the purpose of deterrence. The tough question, of course, is whether mental retardation does, in fact, prevent someone from responding to punishment by abstaining from criminal activity afterwards. Punishment is not expected to deter everyone sent to prison, as the high rates of recidivism remind us. Diverting "insane" persons from penal institutions on the ground that such persons are non-deterrable is really a matter of probability, i.e., since the probability that punishment will serve to deter "insane" persons from future criminal acts is small, we will not punish them, but instead subject them to a process of treatment in the hope that it will have a greater chance of preventing future criminal acts? Mental retardation should, therefore, be judged on the basis of probabilities: is mental retardation the kind of mental disability that reduces the likelihood that punishment will succeed in deterring the person, so that treatment seems more likely to succeed? If medical, psychiatric, or even statistical evidence can demonstrate that the probability of punishment deterring mentally retarded persons from future anti-social behavior is small, then the penal disposition of this group for the sake of deterrence is inappropriate, and the insanity defense should be enlarged to divert them away from penal - correctional dispositions. At present, though, the evidence does not appear available. In the more severe cases of mental retardation, common sense tells us that punishment may have very little chance of altering the individual's future behavior, since his understanding of the significance and meaning of punishment will be, at best, slight. In such cases, therefore, punishment as a deterrent seems unwarranted.

A second theory underlying punishment is rehabilitation. Sanctions are imposed upon convicted defendants to alter their behavior and make them more useful citizens. It is assumed, however, that rehabilitation of "insane" persons can be accomplished better through a program of treatment than through the usual penal sanctions. The insanity defense diverts these "insane" persons to mental institutions for rehabilitation. The same idea should apply to mentally retarded defendants equally as well. To rehabilitate the mentally retarded, a special facility or even a general mental institution seems obviously preferrable to the typical penal institution, especially since most penal institutions have few, if any, facilities or programs for training and educating the mentally retarded. Thus, if rehabilitation is the goal, punishment of the mentally retarded is inappropriate, and the insanity defense should be used to divert them to more effective rehabilitative dispositions.

Restraint of dangerous persons is another purpose of punishment. By incarcerating those convicted of serious crimes, society seeks to protect itself from those proven dangerous. The insanity defense is consistent with this purpose, for a defendant who successfully asserts the defense is incarcerated, not for merely a fixed period, but usually until he is no longer dangerous. There is no reason to deny mentally retarded defendants the insanity defense under this theory of punishment, since, if dangerous, they will be incarcerated anyway. In fact, dangerous mentally retarded defendants committed via the insanity defense may be restrained longer than if committed via a conviction, thus, protecting society even more.

Punishment is also thought to serve as a means of general deterrence. By way of example, punishment of those who break the law reinforces the law-abiding tendencies of the general public. Convicting and punishing the insane, however, does not further this purpose, for the examples are not likely to deter those not involved in the criminal process unless they regard the lessons as applicable to them, which is unlikely unless they identify with the offender. Since sane or even insane persons will probably not identify with the insane defendant, convicting and punishing the insane person will not be an effective deterrent to others. Furthermore, even if punishing insane persons does serve as a deterrent, it is also argued that the objective of deterrence should not be promoted by punishing the insane. In other words, it is improper to punish the insane, and therefore irresponsible persons, solely to serve social functions. The insanity defense, then, prevents the punishment of persons who cannot serve as examples to the general public or who should not be punished simply to achieve social goals. Under this theory of punishment, there is ample reason not to convict and punish the mentally retarded. It seems highly unlikely that the general public will identify with the mentally retarded, nor is it likely that even other mentally retarded persons will have the capacity to appreciate the significance of the conviction and punishment of another retardate. Thus, punishment of the mentally retarded for the purpose of general deterrence seems inappropriate. The insanity defense should divert the mentally retarded, as it does other "insane" persons, away from penal dispositions. Besides, the public lesson may be just as strong if the mentally retarded defendant is committed to a mental institution as if he is committed to a penal institution.

A final, though largely discredited theory of punishment is retribution. The theory is that the criminal must recompense society for the harm he inflicted on it -- an "eye for eye" sort of thing. The insanity defense itself developed to save from retributive punishment those who could not be blamed for the harm they caused. It is generally agreed that the purpose of retribution, whatever validity it still has, is not served by punishing the insane. Since mentally retarded defendants are probably as blameless as other "insane" defendants, (whatever is meant by "blameless") punishing mentally retarded persons for the sake of retribution is unjustified. Culpability is such an inexact, shifting concept that to excuse psychotics but not the mentally retarded from retributive punishment seems arbitrary. Thus, if the insanity defense serves to relieve the blameless from paying back society, then it should also relieve the mentally retarded.

In conclusion, if we regard the insanity defense as a mechanism to prevent the punishment of persons for whom punishment would serve no legitimate purpose, it seems that the insanity defense should also be used to prevent the punishment of the mentally retarded. For whatever purpose punishment is thought to serve -- special or general deterrence, restraint, rehabilitation, or retribution -- the punishment of the mentally retarded does not promote these purposes any more than would the punishment of those who are not punished because of successful insanity defenses. Thus, as long as we continue to use the insanity defense as a means to divert certain persons away from penal - correctional dispositions and into medical - custodial dispositions, we should expand the defense to divert those mentally retarded for whom treatment is more appropriate than punishment.

If the diversion of persons away from penal institutions and into medical ones is the function of the insanity defense, the obvious question is why do it this way. Why not simply replace the insanity defense with a post-conviction procedure that decides which defendants are suited for penal - correctional dispositions and which for medical - custodial dispositions? The ambiguities and uncertainties of the insanity defense make it highly unreliable; there is no assurance that all defendants for whom punishment is inappropriate are diverted to medical institutions; and there is no assurance that those diverted to medical institutions are unsuited for punishment. Surely, the argument runs a dispositional procedure that employs as much expertise as possible would do a better job of disposing of convicted defendants than the ill-understood, clumsy insanity defense does.

Those who argue for the abolition of the insanity defense offer such a procedure as an alternative. After conviction, a body of psychiatrists, penologists, sociologists, or the like would evaluate the defendant and determine what disposition would best serve the needs of the defendant and of society. One objection to this alternative is that, since the disposition of convicted criminals is so vitally important to the person and to society, the dispositional decision should not be entrusted to a panel of experts but should be left in the hands of people's representative, the jury. But perhaps the chief reason we are a long way from adopting such a system is that society is not yet prepared to abandon the centuries-old system of punishing criminals according to their crimes, and selecting only a certain few for less onerous treatment. It is not yet willing to dispose of criminals according to their needs, or according to what the experts consider best for the criminals and for society. Until society is ready to alter drastically the dispositional aspect of its criminal justice systems, the insanity defense will remain the only means whereby persons ill-suited for punishment are separated out for special, non-punitive treatment.

It is, therefore, recommended that the insanity defense be expanded to allow mental retardates to avoid penal dispositions where such dispositions are inappropriate. This can be accomplished in several ways. The legislature may adopt the Durham or A.L.I. test and expressly indicate that mental retardation may suffice as a basis for asserting the insanity defense and so instruct the juries hearing insanity defenses.

## 5.3 Commitment of "Insane" Mentally Retarded Defendants

### (1) The Decision to Commit

In twelve states and the District of Columbia, statutes require the automatic commitment to a mental institution of defendants found not guilty by reason of insanity. Regardless of the defendant's present mental condition (which may be quite different from his mental condition at the time of the offense), in these jurisdictions the court must nevertheless commit the defendant to a mental institution. The Model Penal Code provides for automatic commitment.

In every other state, commitment of defendants found not guilty by reason of insanity is permitted, but not mandatory. Most of these states place this decision in the hands of the trial judge; the other states give the commitment decision to the jury. Some of the state statutes provide no criterion whatsoever for the commitment decision. Most state statutes, however, have set up standards for committing defendants found not guilty by reason of insanity; the two most common are whether the defendant is still insane, and whether he is dangerous to himself and society. Even in those states where commitment is not mandatory, all evidence indicates that most defendants acquitted on the basis of the insanity defense are nonetheless committed to mental institutions.

In all federal jurisdictions (except for the District of Columbia), there is no statutory provision for commitment of defendants successfully asserting the insanity device; nor do the federal courts have any inherent power to commit such defendants. Some federal courts have tried to get the states to commit civilly such defendants.

In Texas, Article 46.02 of the Code of Criminal Procedure orders the trial judge to commit a defendant found insane at the time of the alleged offense if the court considers his "discharge or going at large...(to be) manifestly dangerous to the peace and safety of the people..." This commitment is temporary, however, pending the "prompt initiation and prosecution by the attorney for the state or other person designated by the court of appropriate civil proceedings to determine whether the defendant shall be committed to a mental institution..." Article 46.02 provides another route for committing defendants acquitted on the insanity defense. If the jury that finds a defendant insane at the time of the alleged offense also finds that he is presently insane (incompetent to stand trial) and that he should be hospitalized for his own protection and welfare or the protection of others, the court must order the defendant committed. So if a jury finds that he is both incompetent to stand trial and insane at the time of the alleged offense, it may also commit him to a mental institution. However, if the jury finds a defendant both incompetent and insane at the time of the offense, but does not find that he should be hospitalized, then he cannot be committed and must be finally discharged.

Under Texas law, then, a mentally retarded defendant who is found to be insane at the time of the alleged offense can be committed if he is manifestly dangerous to society, and then only long enough for the state to initiate civil commitment procedures. But if the issue of present insanity or incompetency is also tried, a mentally retarded defendant may be committed indefinitely by the trial court, provided the jury determines that he is incompetent and in need of hospitalization. If the issue of pre[illegible] insanity is not tried, a mentally retarded defendant successfully asserting the insanity defense can be committed only if he is manifestly dangerous. If the issue of present insanity is tried, he may be committed on the more lenient standard of his own welfare or protection or the protection of others. It would seem that a mentally retarded defendant who pleads the insanity defense should not also raise the issue of incompetency, for it is much more difficult to commit him if he is not found presently insane. For the mentally retarded, this could be important. If the retardation is severe enough to make him insane at the time of the alleged offense, it is likely that he will also be presently insane and, therefore, subject to the easier commitment standard. The problem, though, is that the court or the prosecutor may apparently raise the incompetency issue without the defendant's consent or even over his objection. Therefore, a mentally retarded defendant who raises the insanity defense in Texas runs the risk of being committed even though he is not "manifestly dangerous."

Despite this dilemma for mentally retarded defendants, the Texas statutory scheme for committing defendants who successfully interpose the insanity defense is sound. Since there is no justification for committing defendants who are presently sane, it is proper to release defendants a jury finds presently sane. The Texas statute does this. Since there may be a jufistication for committing defendants a jury finds presently insane, it seems appropriate to allow a jury to decide if a presently insane defendant requires hospitalization for his own or society's welfare. The Texas statute also does this. Where there is no finding of present insanity, one way or the other, there is no basis for deciding whether to commit or release a defendant acquitted on the insanity defense. By providing that the regular civil commitment standards and procedures must be invoked to commit such a defendant, the Texas statute guarantees that only those defendants who should be committed are committed following a verdict of not guilty by reason of insanity.

Thus, at least in the initial decision of whether to commit a defendant after he is found insane at the time of the alleged offense, the Texas statute is superior to most other statutory schemes. The only real drawback in the Texas statute concerns the release of those defendants who were found presently insane, insane at the time of the offense, and in need of hospitalization.

The automatic, mandatory commitment of defendants found not guilty by reason of insanity has been criticized for many of the same reasons that the automatic, mandatory commitment of incompetent defendants has been attacked. Essentially, the argument is that the mere fact that a jury has found the defendant insane at the time of the alleged offense does not necessarily mean that the state is now justified in committing him. In most cases, he has not been convicted of the crime and it has not been determined if he is presently insane. Therefore, without a determination that he is dangerous or in need of protection or that he is still insane and in need of treatment, there is no basis for committing the defendant.

Both due process and equal protection challenges have been made to the constitutionality of automatic commitments. The due process argument is basically that a person cannot be involuntarily confined without a full and fair hearing at which the facts justifying his commitment are produced. In other words, to commit a defendant, the state cannot rely on a mere finding of insanity at the time of the offense but must prove why he should now be committed. Committing someone without even a hearing on the issue is a denial of due process. Most due process challenges have failed, however, because the courts have held that defendants found not guilty by reason of insanity constitute an "exceptional class". It is presumed that their insanity continues to the present, a presumption that justifies commitment without a further hearing.

The equal protection challenges have been a little more successful. In 1968, the United States Court of Appeals for the District of Columbia in Bolton v. Harris held that the District of Columbia's automatic commitment of a defendant found not guilty by reason of insanity violated the equal protection of the laws.[6] The commitment of such a defendant was based solely on a finding that there was a reasonable doubt as to his sanity at the time of the alleged offense; yet in all other cases the government must prove that a person is presently insane before it can commit him. The court found no rational basis for committing defendants found not guilty by reason of insanity on a more lenient standard than is used to commit all other persons.

This decision is very much like the Supreme Court's equal protection holding in Jackson v. Indiana. Although Jackson invalidated the automatic commitment of defendants found incompetent to stand trial, its reasoning seems even more applicable to the automatic commitment of defendants acquitted on the basis of an insanity defense. In Jackson the Court held that the mere finding that a defendant was presently incompetent to stand trial did not justify committing him, while to commit any other person a finding that he was dangerous or in need of care or treatment was required. For a defendant found not guilty by reason of insanity there is not even a finding that he is presently insane, but only a finding that he was insane at an earlier time. Since a finding of present insanity does not authorize the automatic commitment of an incompetent defendant, it seems unlikely that the Court would approve of a commitment based solely on a finding of insanity at an earlier time.

Though Jackson v. Indiana does not deal directly with the commitment of defendants found not guilty by reason of insanity, its implication for such commitments seems clear. The automatic commitment of defendants found not guilty by reason of insanity, without a finding that they are currently insane and in need of treatment or protection or that they are dangerous is a violation of equal protection. Thus, the statutes requiring the automatic, mandatory commitment of defendants who successfully assert the insanity defense are of questionable constitutionality.

In most jurisdictions, however, the rule is that defendants acquitted on the insanity defense can be committed only if either their insanity continues or if they are dangerous. For mentally retarded defendants, it would seem that they can always be committed following a verdict of not guilty by reason of insanity, for if their mental retardation serves as the basis for the finding of "insanity", they will still be "insane" at the time of commitment. Since mental retardation is irreversible, they will always be "insane" in the legal sense. Thus, even in jurisdictions where commitment is not mandatory, in all likelihood mentally retarded defendants found not guilty by reason of insanity can and will be committed to mental institutions. This may very well explain why so few mentally retarded defendants try to interpose the insanity defense. In their survey of mentally retarded federal prisoners, Brown and Courtless found that over 95% of the mentally retarded prisoners did not even raise the insanity defense. For the mentally retarded, the chances of avoiding incarceration may be greater by standing trial and risking conviction. More important, the commitment to a penal institution following conviction may in fact turn out to be considerably shorter than the commitment to a mental institution following a successful insanity defense. In many cases, therefore, it may be disadvantageous for mentally retarded defendants to raise an insanity defense and subject themselves to almost certain confinement for an indefinite period.

The crucial question, however, concerns the duration of commitment. How long can defendants, particularly mentally retarded defendants, found not guilty by reason of insanity be confined to mental institutions?

(2) The Duration of Commitment

The standards for releasing defendants who have been committed to mental institutions following acquittal on grounds of insanity vary among the jurisdictions. In some jurisdictions release is conditioned upon the patient's becoming "sane." In some the standard is whether he is "not dangerous". Some jurisdictions require that the defendant be both "sane" and "not dangerous," while others permit release if he is either "sane" or "not dangerous." The Model Penal Code provides for release if he is "not dangerous."

In almost two-thirds of the states, there are provisions for the conditional release of defendants who have been committed following a successful insanity defense. The standards for conditional release, which resembles parole, are usually stated in terms of public safety, or in terms of the defendant's improvement or his best interests.

In Texas, as we have seen, defendants acquitted on the insanity defense and not found either presently insane or sane can only be committed through the regular civil commitment procedures, and therefore, are eligible for release under the civil commitment standards. However, defendants acquitted on the insanity defense and found presently insane must be committed if the jury finds them in need of hospitalization. Such a defendant is confined to a mental institution "until he becomes sane."

In most jurisdictions, the decision to release a person who was committed following a successful insanity defense is rested in the committing court. However, the issue of whether a person is eligible for release must usually be raised by the superintendent of the mental institution to which he was committed. In some states, the superintendent may release the person at his own discretion without referring the matter to a court for approval. A few states have given the decision to an administrative agency. Of course, the patient himself may always seek release by means of a habeus corpus petition.

In Texas, Article 46.02 provides two procedures for releasing a defendant who has been found insane at the time of the trial and insane at the time of the offense. If the superintendent of the mental institution finds that the defendant is now sane, he must notify the court of his finding. The court must then empanel a jury to determine whether the defendant is now sane. If after a year of commitment the superintendent has not determined that the defendant is sane, the defendant himself may petition the court for a sanity hearing. If the judge thinks his request has "probable merit," he must empanel a jury to determine whether the defendant is sane or insane. Once a year the defendant has the right to make such a petition.

In Texas and other jurisdictions, the requirement that a defendant who has been committed following a successful insanity defense prove he is sane before he can win release poses a special problem for the mentally retarded. If mental retardation is the cause of his "insanity," it is highly unlikely that he will ever become "sane." Thus, a commitment until he becomes sane amounts to a life sentence for the mentally retarded person. It is the same objection made against the commitment of incompetent defendants until they become competent. If the disability is incurable, he can never obtain his release.

When a mentally retarded defendant is found insane under the applicable test -- whether M'Naghten, irresistible impulse, Durham or Model Penal Code -- he will usually have to prove his "sanity" under the same test. Measured by the applicable test, he will probably never be adjudged "sane." So if his continuing "insanity" is the basis of his commitment, he will be facing an indefinite, perhaps permanent, commitment.

In Texas, the standard for release may be particularly inappropriate. As mentioned, a defendant who has been found insane at both the time of the alleged offense and the time of the trial can be committed until he becomes "sane." But the standard for determine "sanity" is not specified. Apparently, the standard of "present insanity" may be used, i.e., the standard for incompetency to stand trial -- whether he can act rationally in his own defense -- may be applied to determine if a person committed because he was insane at the time of the alleged offense should be released. In other words, the M'Naghten test was used to find him insane yet the competency test is used to determine if he is now sane. Because the defendant if found sane cannot be tried as he has been acquitted on the insanity defense, the use of a test that inquires into his capacity to stand trial is illogical. On the other hand, even if the defendant's sanity for purposes of release is measured by the test for insanity at the time of the alleged offense (M'Naghten), such a test is still inappropriate, for the basis of his commitment was that he required hospitalization for his own welfare or protection or the protection of others. It is only logical that his eligibility for release should be evaluated on the same basis, not on whether he is "sane."

It is, therefore, recommended that Article 46.02 be changed to provide that defendants found not guilty by reason of insanity and presently insane and committed to a mental institution can be released if they no longer require hospitalization for their own welfare or protection or the protection of others. Such a change would simply make the standards for release reflect the reasons for commitment.

There is nevertheless a more serious objection to release standards based on recovery of sanity. Underlying commitments based on the defendants lack of sanity is the assumption that the commitment will be theraputic. That is, it is assumed that the confinemtne in a mental institution of a defendant found not guilty by reason of insanity will help him become sane. The objection to such theraputic commitments is constitutional. If the mental institution to which the person is confined cannot or will not provide adequate treatment directed toward his recovery, then there is no justification for his commitment. If the person committed is incurable, then the theraputic purpose for his commitment is impossible to achieve. In either case, the person is involuntarily deprived of his liberty without serving any legitimate and obtainable interest, therefore, his commitment is unconstitutional.

There is some strong judicial support for such a claim. In Rouse v. Cameron, the United States Court of Appeals for the District of Columbia indicated that the absence of treatment for a defendant committed following a verdict of not guilty by reason of insanity might render his commitment unconstitutional.[7] Rouse v. Cameron, the leading case on the "right to treatment," offered four constitutional theories for invalidating the commitment of persons found not guilty by reason of insanity based on the "right to treatment": (1) commitment without an express finding of present insanity might violate due process if treatment is not promptly undertaken; (2) confinement for longer than would have been permitted upon conviction might violate due process if no treatment were provided; (3) failure to provide treatment might be a denial of equal protection; and (4) indefinite confinement without treatment might constitute cruel and unusual punishment.

For mentally retarded defendants committed after a successful insanity defense, the "right to treatment" claims could be significant. If the institutions to which the mentally retarded are committed lack the facilities to treat their special problems, justifying their commitments on the basis of treatment seems a bit irrational, if not outright unconstitutional.

For mentally retarded defendants especially, there is an even more compelling constitutional claim than a "right to treatment." Since mental retardation is essentially incurable, committing such persons for the purpose of curing them may be unconstitutional. In *Jackson v. Indiana*, the Court held that the commitment of an incompetent defendant until he became competent violated the equal protection of the laws, in that, since it was highly unlikely he would ever become competent, his commitment amounted to a life sentence, whereas persons committed under other statutes would be eligible for release whenever their condition warranted it. The same analysis is applicable to the commitment of mentally retarded defendants found not guilty by reason of insanity. If they are committed until they become "sane," their commitments could amount to life sentences, whereas persons civilly committed can be released whenever they are not dangerous or are not in need of treatment.

Thus, a good case can be made that the state statutes (including Texas')requiring that a defendnat found not guilty be reason of insanity be committed until he becomes sane violates equal protection where, as in the case of the mentally retarded, it is unlikely he will ever become sane.

The due process holding of Jackson v. Indiana likewise argues against the constitutionality of commitments based solely on providing treatment. The Court held that due process forbids a state to confine an incompetent in the forseeable future, and to confine him if he is not progressing toward competence. There is no reason to distinguish the commitment of defendants found not guilty by reason of insanity from the commitment of incompetent defendants. Both are committed for treatment. If it is unconstitutional to confine incompetent defendants who are not likely to recover competency, it is equally unconstitutional to confine defendants found not guilty by reason of insanity who are not likely to become sane or are not in fact becoming sane. Thus, it seems unconstitutional to confine mentally retarded defendants acquitted after a successful insanity defense for any longer than is necessary to determine if they will become sane in the near future or when they are not progressing toward sanity. For most mentally retarded defendants, committing them for treatment will be highly questionable, since it should be certain from the outset that they will probably never become legally sane.

Of course, a state may still commit a defendant on the basis of protecting himself or society. However, if a defendant is not civilly committable, the state can only commit him if he is curable. Thus, non-dangerous mentally retarded defendants, whether they are found incompetent to stand trial or not guilty by reason of insanity, may not be confined to mental institutions consistently with the principle of Jackson v. Indiana

Apart from logic, then, the Due Process Clause requires that Article 46.02 of the Texas Code of Criminal Procedure be changed to make persons found not guilty by reason of insanity and ordered committed to a mental institution eligible for release, not when they become sane, but when they are no longer in need of hospitalization for their own welfare or protection or for the protection of others. The commitment of incurable defendants, such as the mentally retarded, until they become sane appears, therefore, to be unconstitutional.

## 6.0 SUMMARY

In this study various aspects of procedural and case law were examined to determine their relative impact on the prosecution of the mentally retarded offender. As in other areas of criminal law, there is wide variability from one state to another in the application of the law to the mentally retarded. Yet, one generality seems to be clear; there is significant ambiguity in the law regarding the prosecution of the mentally retarded offender. Two areas of the law that seem peculiarly ambiguous are; tests of competency to stand trial and tests of criminal responsibility.

Legal competency refers to the defendant's knowledge and awareness of the proceedings in which he is involved and his capacity to participate in his own defense. For the mentally retarded person accused of a crime the laws of incompetency pose special problems, mainly because they are designed more for the mentally ill or the insane than for the mentally retarded. Very little empirical information is available on the effect of mental retardation on a person's ability to understand the criminal proceedings or to participate effectively in his defense. The common practice of committing an incompetent individual to an institution until he regains competency presents a peculiar difficulty to the mentally retarded individual because, unlike mental illness, the condition of retardation is apparently irreversible. Commitment in such instances constitutes institutionalization comparable to a life sentence.

The second area of legal ambiguity involved in the prosecution of mentally retarded offenders relates to tests of criminal responsibility. In fact, it is not certain if the existing legal rules for the insanity defense recognize mental retardation as a basis for excusing a defendant from criminal liability. As it stands now, the legal rules are ambiguous, neither including nor excluding mentally retarded persons from that class of mentally disabled persons who should not be held responsible for their criminal acts.

In cases where the mentally retarded defendant has been ruled legally insane, there remains the problem as to what disposition should be made in the case. The ambiguities and uncertainties of the insanity defense may confound the decision as to the appropriate disposition. There is no assurance that all defendants for whom punishment is inappropriate are divered to mental institutions.

This review of the procedural laws regarding incompetency and insanity and their utility in the prosecution of mentally retarded defendants suggests several recommendations which would clarify present legal ambiguities. The recommendations which follow are addressed to specific procedural aspects of the current law and each recommendation is followed by a brief discussion.

- *RECOMMENDATION: Texas should discontinue the practice of automatically committing a defendant for a competency examination and, instead, only commit those defendants who have been* *determined ineligible for bail or who, for medical or other legitimate reasons, cannot be examined on an out-patient basis.*

Normally, when the question of a defendant's competency to stand trial is raised in a criminal proceeding, such proceedings are suspended so that the defendant may be examined. The prevailing practice in most states is to commit the defendant to a mental health facility for purposes of examination. The duration of this commitment varies from state to state, but normally exceeds more than a month. There is serious question as to the constitutionality of this practice since the automatic commitment of the defendant to a mental health facility for examination may constitute a violation of his right to bail. In the majority of the states, including Texas, defendants have either a statutory or constitutional right to pretrial release in non-capital cases which is absolute. The fact that a defendant has been ordered to undergo a mental examination should not be interpreted as a condition which should automatically deny the right to bail. Since automatic commitment to an institution occurs when the issue of competency is raised, and as such commitment represents a denial of freedom without access to bail, the provision of due process would seem to require at least that a hearing be initiated to determine whether such commitment is necessary, and whether the defendant could be examined on an out-patient basis.

- *RECOMMENDATION: The State's procedural laws should be amended and administrative practices reviewed to assure that a defendant committed pretrial pursuant to a competency evaluation be confined for as short a period as reasonably necessary to properly evaluate his competency.*

Although recommendations have been made against the practice of automatically committing defendants pretrial for competency evaluation, it is recognized that in some cases the defendant ought to be committed since he represents a danger either to himself or to the community. In such cases, both the law and the procedural practice of the court should assure that the duration of the defendant's confinement is as short as reasonably possible. Since such commitments are made prior to any determination of guilt, undue delay in the examination represents unnecessary denial of his freedom and borders on practices which are unconstitutional in nature.

- *RECOMMENDATION: The court should discontinue the practice of perfunctorily accepting the conclusions of doctors and psychiatrists who examine the defendant, and conduct a full and fair evidentiary hearing to reach an independent and informed decision on the question of the competency of a mentally retarded defendant.*

The concept of due process requires that any person facing the loss of his liberty be accorded a full and fair hearing. Judicial procedures in competency hearings which simply accept the conclusions of expert witnesses (i.e., psychologists and psychiatrists) without providing the opportunity for a full and fair hearing as to the evidence that supports these conclusions work against the interest and due process rights of the mentally retarded offender. It is not considered sufficient for the court to simply acquiesce to the medical or psychiatric report, but it should make an independent informed decision about the defendant's competency. In such hearings the defendant should be represented by counsel and have an opportunity to examine all witnesses testifying about his competency and be provided the opportunity to present evidence in his behalf. Similarly, the prosecutor should have an opportunity to examine all witnesses and present evidence in the interest of the state.

The heart of this recommendation, however, is for the court to reject conclusionary findings of experts and examine carefully the medical and factual basis underlying these findings. Hearings which provide a full and fair disclosure of the evidence regarding competency, as opposed to hearings which perfunctorily accept the conclusions of expert witnesses, should provide the jury a more meaningful basis whereby to determine the competency of the mentally retarded offender.

- *RECOMMENDATION: Article 46.02 of the Texas Code of Criminal Procedure should be amended to require the prosecution to introduce evidence sufficient to demonstrate the mentally retarded defendant's potential danger to society or himself prior to his commitment on a finding of incompetency.*

Presently, Texas law requires that on the finding of incompetency, the jury determine whether the defendant requires hospitalization for his own welfare and protection or the protection of others. It is recommended, however, that the burden of proof as to the relative danger of the individual be laid upon the prosecution as a safeguard against the commitment of otherwise nondangerous mentally retarded defendants. This would require the prosecution to present evidence indicating the need for commitment, and protect the defendant from a jury which might automatically conclude that a judgement of incompetency implies that the individual would be a danger to himself or to others.

- *RECOMMENDATION: Article 46.02 of the Texas Code of Criminal Procedures should be amended to provide all incompetent defendants who have been committed involuntarily under this Article to be eligible for release from confinement whenever they do not require hospitalization for their welfare and protection or the protection of others.*

The intent of the current Texas statute providing for the commitment of an incompetent defendant is based upon the assumption that he is a danger to himself or the community. However, the decision to release an incompetent defendant is based upon his capacity to stand trial, not upon his capacity to be dangerous to himself or others. In short, this means that the reason the incompetent defendant is committed has nothing to do with the procedures for his release from commitment. It is recommended, therefore, that the law be amended so that defendants would be released from confinement at such time as they no longer represent a danger to themselves or others, and not solely on the basis of their competency to stand trial.

- *RECOMMENDATION: Statutes requiring the commitment of an incompetent mentally retarded defendant because he represents a danger to the community should be revised to parallel civil statutes affecting the commitment of the mentally retarded.*

Society's justification for committing dangerous incompetent defendants is essentially the same as the justification for civilly committing mentally ill persons. Both reflect a moral and social judgement about the circumstances in which it is appropriate to confine mentally disabled persons involuntarily. Broadly, the grounds for civil commitment are that a person is dangerous to others or that he is dangerous to himself or in need of care. The same standards used for civil commitment should also be used for the commitment of incompetent mentally retarded offenders. It is recommended, therefore, that statutes governing the commitment of incompetent mentally retarded defendants parallel the civil statutes affecting comparable commitments.

- *RECOMMENDATION: All statues and judicial practices that automatically commit an incompetent mentally retarded defendant to a mental institution should be abolished in favor of procedures that inquire into whether the defendant should be or needs to be committed after he has been found incompetent to stand trial.*

An individual found incompetent to stand trial is normally committed to a mental institution until such time as he is adjudged competent to participate in his trial. While this procedure may be defensible in the case of a mentally ill individual since his disability is considered reversible, it can be tantamount to life imprisonment in the case of the mentally retarded individual since mental retardation is not usually considered a transitory state, but a condition which is relatively irreversible. The commitment of the individual pending his subsequent competency to stand trial amounts to indeterminate incarceration prior to a finding of guilt. Part of the rationale for commitment to a mental institution on a finding of incompetency certainly involves the motivation of protecting society from an individual not considered responsible for his action; however, it is quite conceivable that a significant number of mentally retarded individuals who could be adjudged incompetent represent little risk to the community and could be more effectively treated in community-based programs as opposed to institutionalization in a mental health facility. It is recommended, therefore, that the incompetent mentally retarded defendant not be automatically committed to an institution, but that an examination be conducted to determine his relative risk to the community and the course of treatment which would be most effective in his case. If the defendant is found to represent a potential threat to the community, then commitment could be appropriate, but if not, commitment may represent a disposition which is both costly to the state and could be of little benefit to the individual involved.

- *RECOMMENDATION: Statutes should be enacted which require the court to periodically reexamine the condition of a mentally retarded defendant committed because of incompetency to stand trial.*

The purpose of this examination is two-fold; (1) to determine whether it remains necessary to commit the individual due to the danger he represent to the community or his need for constant supervision, and (2) to determine whether he is now competent to stand trial. Such statutes would be significant in assuring that incompetent mentally retarded defendants are not warehoused indefinitely in institutions when they no longer represent a clear and present danger to themselves or to the community. In addition, they would assure that the mentally retarded defendant is not detained indefinitely when he otherwise may be competent to stand trial.

- *RECOMMENDATION: Defense attorneys should exercise great caution in plea bargaining the cases of defendants who either are, or are suspicioned to be, mentally retarded.*

Plea bargaining involves negotiation between the prosecution and the defense in which the prosecution will either reduce the charge pending against the defendant, or the length of the sentence imposed upon the defendant, in exchange for the defendant's plea of guilty. This is a very common negotiation in the prosecution of criminal cases and has the advantage of expediting such cases since the prosecution, in obtaining a plea of guilty, is not required to try the case before a jury. In cases where the state has developed a very strong case against the defendant, the advantage to the defendant is that he receives a lesser sentence than he may otherwise receive by pleading not guilty and going to a jury trial.

Notwithstanding, there are many critics of plea bargaining who allege that it is a less than adequate way to render justice and equity. Plea bargaining is a widespread practice and occurs in the prosecution of approximately 95% of the felony cases tried in Texas. Considering the incidence of mentally retarded individuals within the custody of the Texas Department of Corrections as identified in other studies, it is evident that plea bargaining can work adversely in the case of the mentally retarded defendant. Granting the fact that the mentally retarded defendant has less intellectual capability to understand the proceedings in which he is involved, he is probably more amenable to coercion by the prosecution to plead guilty in exchange for a lesser sentence. Since the obligation of the defense is to provide the defendant with the best possible legal advice, in many circumstances it may be better to encourage the mentally retarded defendant to plead incompetent than to negotiate a plea for a lesser sentence. However, the lack of understanding among many defense attorneys as to the nature of mental retardation, coupled with ignorance of the degree to which tests of incompetence apply to the mentally retarded defendant, can create a situation in which the individual is encouraged to plead guilty to charges of which he may not be criminally culpable. Therefore, it is extremely important that defense attorneys, as well as prosecutors, familiarize themselves with the nature of the debilitating effect of mental retardation and assure that such individuals are granted every opportunity for an adequate defense and are not simply encouraged to plead guilty for the sake of expediency.

● *RECOMMENDATION: The Texas Legislature should substitute the word "incompetent" for the words "presently insane" and "incompetency" for "present insanity" in Article 46.02 of the Code of Criminal Procedure.*

Presently, Texas law defines incompetency to stand trial as synonymous with legal insanity. There are a number of difficulties that proceed from this definition, including the fact that legal insanity has virtually no commonality with the definition of mental illness as developed by the fields of psychiatry and clinical psychology. The use of the test of insanity to determine incompetency places too narrow a limit on those individuals deemed to be incompetent to stand trial. This definition does not take into consideration the defendant's mental capacity to participate in his own trial. Competency should incompass the defendant's ability to recall the factual circumstances surrounding the alleged crime, to relate these facts to his counsel in a coherent manner, to decide with his counsel on a plea, to approve the legal strategy used in the trial, to assist his counsel in the evidence and tactics used in the trial, to testify in the trial if necessary, and to appreciate to some degree the significance of the proceedings and his involvement in them. It is the conclusion of this study that to limit the definition of incompetency to the defendant's awareness of the principles of justice and equity and restrict the criminal justice process from adequately handling the mentally retarded offender.

- *RECOMMENDATION: The legal definition of insanity and the use of insanity as a defense should be expanded to allow mentally retarded defendants to avoid penal dispositions where such dispositions are inappropriate.*

Under Texas law, and the laws of many other states, the issue of insanity refers to whether the individual is laboring under such a defect of reason from disease of the mind as not to know the nature or quality of his action, or if he does know, is unable to distinguish between right and wrong in relation to such criminal acts. While this definition is rather conservative in the case of mentally ill individuals, it is even less sensitive in the case of a mentally retarded defendant. Properly speaking, the capacity to discriminate between right and wrong is not a binary issue, but is a matter of degree. In the case of the mentally retarded, by definition their intellectual capacity to understand and to deal with their environment is significantly impaired. To focus criminal responsibility solely on the person's ability to discriminate between right and wrong is to be insensitive to the pervading nature of the disability of the mentally retarded individual. It is suggested, therefore, that the current legal definition of insanity be expanded to consider the disability of the mentally retarded and that consideration should be given to the Durham test or the test recommended by the American Law Institute for defining legal insanity.

- *RECOMMENDATION: Article 46.02 of the Texas Code of Criminal Procedures should be amended to provide that mentally retarded defendants found not guilty by reason of insanity and presently insane and committed to a mental institution can be released if they no longer require hospitalization for their own welfare or protection or the protection of others.*

Under Texas law, a defendant who has been committed to an institution following a successful insanity defense must prove himself sane before he can be released from the institution. This legal requirement works a special hardship in the case of the mentally retarded. If it has been successfully argued that his mental retardation is the cause of his "insanity" it is highly unlikely that he will ever be able to demonstrate that he is "sane" since the condition of mental retardation is thought to be irreversible. Thus the commitment of a mentally retarded individual until such time as he can demonstrate that he is sane can amount to a life sentence.

Ostensively, the purpose of committing a mentally retarded individual who has successfully pleaded insanity as a defense is because he is in need of custody for his own welfare or protection or the protection of others. Yet, a mentally retarded individual so committed may at some future point no longer need institutionalization for his own sake or for the good of society; however, it may be impossible for him to be released since the requirement for his release involves a demonstration of his legal sanity. It appears, therefore, in Texas law, that the basis for commitment has little or nothing to do with the criteria for release. This ambiguity should be rectified and it is recommended that the crieria for release be based on the need for continued commitment for the person's own welfare or protection or the protection of others as opposed to his demonstration of legal sanity.

# FOOTNOTES

## FOOTNOTES

[1] Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 2d 815 (1966).

[2] Vernon's Annotated Code of Criminal Procedures, Art. 46.02, Sec. 2(a).

[3] Dusky v. United States, 362 U.S. 402, 80 S.Ct. 78[illegible], 4 L.Ed. 2d 824 (1960).

[4] Jackson v. Indiana, 255 N.E. 2d 515 (1970).

[5] Durham v. United States, 94 U.S. App. D.C. 228, 214 F2d 862 (1954).

[6] Bolton v. Harris, U.S. App. D.C. 1, 395 F2d 642 (1968).

[7] Rouse v. Cameron, 125 U.S. App. D.C. 366, 373 F2d 451 (1967).

# PROJECT CAMIO

## Correctional Administration and the Mentally Incompetent Offender

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*olume 2* Theories on Criminality and Mental Retardation

*olume 3* The Mentally Retarded and the Law

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*olume 8* A National Survey of the Diagnosis and Treatment of Mentally Retarded Offenders in Correctional Institutions